Supreme Court, U.S.
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No. ____

In The Supreme Court of the United States

GOLDEN BRIDGE TECHNOLOGIES INC.,
Petitioner,

v.

MOTOROLA INC; ERICSSON INC; QUALCOMM INCORPORATED; LUCENT TECHNOLOGIES INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI [REDACTED]

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QUESTION PRESENTED FOR REVIEW

Whether deceptive and joint conduct which violates mandates governing the consensus process of a standard setting organization results in antitrust liability where such conduct removes a member's product from the standard?

PARTIES TO THE PROCEEDING

Petitioner is Golden Bridge Technologies, Inc. Respondents are Motorola Inc., Ericsson Inc., Qualcomm Incorporated, and Lucent Technologies, Inc.*

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* Nokia, Inc., was formerly a party to this action but was dismissed with prejudice on September 10, 2007. T-Mobile, Inc., was also formerly a party to this action but was dismissed with prejudice on February 6, 2007. Panasonic Mobile Communications Development Corp of USA and NTT DoCoMo USA Inc. were also formerly parties to this action but were dismissed with prejudice on July 15, 2005.

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The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-11a) is published at 547 F.3d 266. The First memorandum opinion and order of the United States District Court for the Eastern District of Texas (Pet. App. 32a-50a) is published at 416 F. Supp. 2d 525. The Second memorandum opinion and order of the United States District Court for the Eastern District of Texas (Pet. App. 12a-31a) is unpublished. It is unofficially reported at 2007 WL 2688487.

JURISDICTION

This judgment of the Court of Appeals was entered on October 23, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The Sherman Act, 15 U.S.C. § 1, provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT OF THE CASE

I. BACKGROUND FACTS AND ISSUES

This case arises under the Sherman Act, 15 U.S.C. § 1, as a result of a conspiracy and group boycott formed and executed by Respondents to exclude

Petitioner's technology from the Third Generation Partnership Project ("3GPP"). 3GPP is a non-profit standard setting organization which prepares, approves, and maintains world-wide standards for Wideband Code Division Multiple Access ("WCDMA") devices and systems. Pet. App. 32a. This standard establishes uniform technologies for the telecommunications industry to ensure worldwide compatibility of cellular devices and systems. *Id.* at 43a. If telecommunications equipment is not in compliance with 3GPP standards it will not be compatible with the telecommunications networks and other equipment. *Id.* at 43a. Thus, any wireless communication technology not included on the standard is of limited commercial value. *Id.* at 43a-44a.

Respondents and Petitioner, Golden Bridge Technology ("GBT"), along with 260 other companies, are members of 3GPP who collectively are responsible for the development of the 3GPP standard. Pet. App. 2a. The standard is maintained by consensus of the members who analyze and adopt technologies to be used in the standard. *Id.* at 2a. The members are divided into smaller working groups, each of which is assigned to one of six technical specification groups. *Id.* at 3a. These working groups meet on a regular basis to discuss their findings and to reach a consensus regarding the technologies to be included in the standard.[1] *Id.* at 3a. All decisions regarding the

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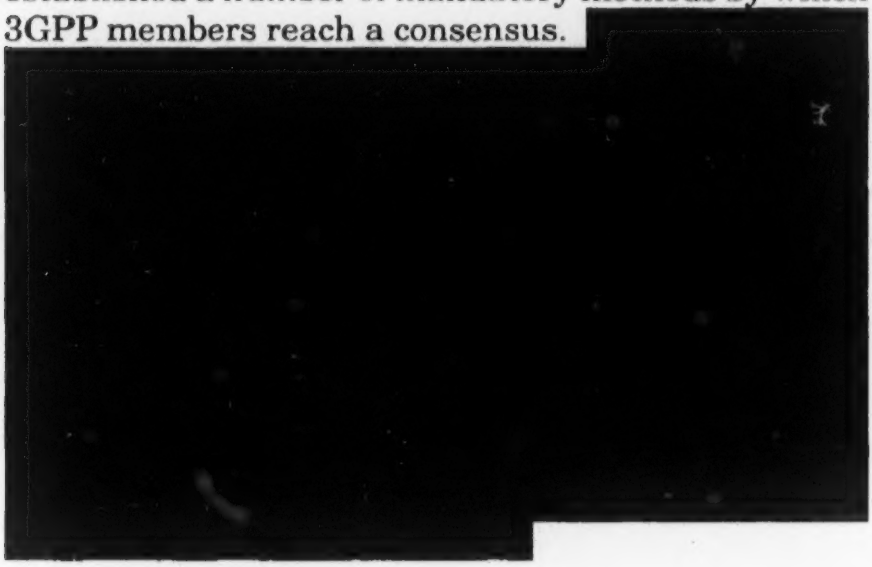
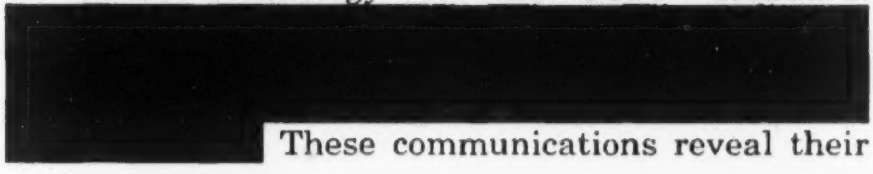
[1] Technologies included in the standard are either mandatory or optional. An optional technology feature means that manufacturers do not have to use a technology, but if they choose to do so, they must follow the 3GPP standard to ensure compatibility. Pet. App. 3a.

standard and relevant technologies are made through this consensus process whereby the members of 3GPP are able to update and maintain the standard. In order to regulate and guide this process, 3GPP has established a number of mandatory methods by which 3GPP members reach a consensus.



Petitioner develops technology utilized in the wireless communications industry and specifically for WCDMA systems. Pet. App. 33a. GBT owns the patent to a technology called Common Packet Channel ("CPCH") which allows medium sized packets of electronic information to be sent between a cellular phone and a base station. *Id.* In December 1999, CPCH was adopted as an optional feature of the 3GPP standard. *Id.* This generated immediate and forceful opposition from Respondents who opposed the addition of GBT's technology to the 3GPP standard.



These communications reveal their

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secret opposition to CPCH and set an agenda to remove the technology from the 3GPP standard.

CPCH remained an optional feature of the standard until June 2005. However, Respondents' had begun their campaign to exclude CPCH from the market several months earlier, when they initiated a *sub rosa* effort to remove CPCH from the 3GPP standard. Their conspiracy began shortly after the 3GPP working group meeting in Scottsdale, Arizona. [redacted] Instead, days after the meeting ended, Respondents initiated a secret email exchange amongst themselves and a few other select 3GPP members. [redacted] However, Respondents never sought, nor did they receive approval to conduct this email exchange, and as such, it was conducted entirely outside the sanctioned communication channels of 3GPP.

[redacted]

[redacted] Respondents' careful planning was successful. GBT had no notice that its technology was targeted for removal from the standard and thus was not present at the meeting and unavailable to oppose the removal vote. As a result, the plenary voted to remove CPCH from the standard. Despite GBT's subsequent efforts, CPCH was officially removed from the standard during the Quebec plenary meeting from June 1-3, 2005. Pet. App. 4a.

The effect of Respondents' successful conspiracy was the complete exclusion of CPCH from the telecommunications market. Removal from the standard rendered CPCH obsolete because no company would license technology that was incompatible with other cellular communications equipment. Pet. App. 44a. As a result, CPCH became "unsaleable" because the 3GPP standard is not just a "stamp of approval" but rather is a technology's exclusive path to the market. *Id.*

II. DECISION OF DISTRICT COURT

On May 6, 2005, GBT brought suit against Respondents under § 1 of the Sherman Act alleging an unlawful conspiracy to remove CPCH from the 3GPP standard. On July 12, 2005, Respondents filed a Joint Motion to Dismiss Petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6) arguing that GBT failed to properly allege that Respondents engaged in a conspiracy. Pet. App. 35a. Respondents also argued that they did not conspire against GBT but only made recommendations as participants of the Feature Clean Up Committee at the March 2005

meeting in Tokyo. *Id.* at 36a. GBT's response was that Respondents combined and conspired to refuse to deal with GBT with respect to CPCH and encouraged others to refuse to deal with GBT by eliminating CPCH from the 3GPP standard in violation of § 1 of the Sherman Act. *Id.* at 39a-40a.

On February 17, 2006, the United States District Court for the Eastern District of Texas, Marshall Division, entered a Memorandum Opinion and Order in favor of GBT and Denied Respondents' Joint Motion to Dismiss. Pet. App. 32a-50a. The District Court specifically held that as pled, Respondents' action exemplified a classic group boycott constituting a *per se* violation of § 1 of the Sherman Act. *Id.* at 39a. The District Court also found that as a result of Respondents' actions GBT can still offer to sell CPCH technology in theory, but in reality no one will purchase it. *Id.* at 43a.

On December 8, 2006, Respondents filed a Joint Motion for Summary Judgment arguing that their conduct did not violate § 1 of the Sherman Act. Respondents contended that removal was necessary to rid the standard of an outdated technology. Pet. App. 22a. GBT responded and cross-moved for summary judgment arguing that Respondents formed a group boycott in violation of core mandates governing 3GPP's consensus process. On February 16, 2007, oral arguments were heard by the District Court. On September 11, 2007, the District Court entered a Memorandum Opinion and Order and Final Judgment in favor of Respondents.

The District Court found that Respondents' conduct reflected a standard-setting organization at work and

that the secret email discussion following the Scottsdale meeting provided no evidence that Respondents had a conscious commitment to a common scheme designed to achieve an unlawful objective. Pet. App. 26a. The District Court reached these findings despite the undisputed fact that Respondents' exclusive email discussions were conducted in derogation of 3GPP's consensus process.

III. DECISION OF THE FIFTH CIRCUIT

On appeal, the Fifth Circuit affirmed the District Court's grant of summary judgment in favor of Respondents. The Fifth Circuit held that none of the emails, or any other evidence presented, showed an explicit understanding between the Respondents to collude and unlawfully eliminate CPCH from the standard. Pet. App. 7a. The Court stated that the emails revealed a common dislike for CPCH, but that common dislike is not the same as an explicit understanding to conspire. *Id.* at 8a. The Court also noted that the evidence of a conspiracy in this case was circumstantial, and that to show conspiracy, circumstantial evidence must tend to exclude the possibility of independent action. *Id.* at 5a-6a.

The Court held that the evidence did not tend to exclude the possibility that the Respondents acted independently, motivated by a desire to improve the 3GPP standard by removing outdated and underused

technologies. *Id.* at 10a. The Fifth Circuit did not consider the District Court's failure to consider GBT's Cross Motion for Summary Judgment, nor did it consider whether Respondents' secret emails violated 3GPP's mandates.

REASONS FOR GRANTING THE WRIT

This case provides the Court with a proper vehicle to address and clarify emerging aspects of antitrust law. Standard setting organizations ("SSO") present unique antitrust risks that have not been fully addressed in Sherman Act decisions to date. These organizations are designed to achieve pro-competitive benefits by ensuring the compatibility of products and technology in various industries. SSOs also wield immense industry power. Deceptive conduct disguised as legitimate standard setting activity presents a distinct threat that the substantial power of an SSO will be exploited and used for unlawful exclusionary purposes resulting in anticompetitive harm. In order to guard against this result, conduct which undermines the consensus forming mandates of an SSO must constitute a violation of the Sherman Act as a matter of law. Furthermore, this issue is ripe for consideration as the Fifth Circuit's ruling in this case conflicts with that of the Third Circuit regarding applicability of antitrust law to subversion of SSOs by powerful member groups.

I. Deceptive Conduct within Standard Setting Organizations Violates Antitrust Law

It is well settled that there is the inherent potential for exclusionary conduct when deceptive conduct is

disguised as normal standard setting activities. This potential for SSO "hijacking" has been expressly acknowledged by this Court. See, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501-02 (1988); *Am. Society of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982). For example, in *American Society of Mechanical Engineers*, this Court noted that SSOs "can be rife with opportunities for anticompetitive activity." *Id.* at 571. In *Allied Tube*, this Court examined, in detail, the substantial risk of antitrust harm presented when an SSO is subverted by a single member or a small group of members. This Court explained that SSO members have clear motives to restrain trade, to wit: "There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." *Allied Tube*, 486 U.S. at 500 (citing *American Society of Mechanical Engineers, Inc.*, 456 U.S. at 571). This incentive to restrain trade is a result of the fundamental tension between antitrust laws and the structure of an SSO. The Court described this tension by specifically stating that: "Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny."[2]

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[2] *Allied Tube*, 486 U.S. at 500; See also, *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-60 (1961); *Fashion Originators' Guild of Am, Inc. v. FTC*, 312 U.S. 457 (1941) (per curiam); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

The scrutiny placed upon an SSO is based upon the premise that the members have economic motives to restrain competition and utilize the organization for their own benefit. There is little doubt that "[p]roduct standardization might impair competition in several ways.... [It] might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices." *Allied Tube*, 486 U.S. at 501 (citing 7 P. Areeda, Antitrust Law ¶ 1503, p. 373 (1986)). A recent Third Circuit decision echoes these sentiments regarding the potential danger for antitrust harm stemming from standard setting activities. See, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007). In *Broadcom*, the issue before the Third Circuit was whether the deception of an SDO (standards determining organization) may give rise to antitrust liability. *Id.* This issue was raised by Broadcom's allegations that Qualcomm had fraudulently induced a number of SSOs to include its proprietary technology in their standards by falsely agreeing to abide by SSO policies on intellectual property rights. As alleged, Qualcomm promptly breached those agreements by licensing its technology against SSO terms requiring fair and non-discriminatory licensing. *Id.* at 304. In its analysis, the Third Circuit took note of numerous authorities on point, including "*Allied Tube*, ... administrative tribunals, law enforcement authorities, and some courts..." *Id.* at 310. The Third Circuit relied upon language from this Court's ruling in *Allied Tube* in stating that: "conduct that undermines the procompetitive benefits of private standard setting may, at least in some circumstances, be deemed anticompetitive under antitrust law." *Id.* at 310. The Third Circuit also referred to the "landmark" opinion

of the Federal Trade Commission *In the Matter of Rambus, Inc.*, No. 9302, 2006 WL 2330117 (F.T.C. Aug. 2, 2006), and noted that the FTC was "particularly noteworthy for its extensive discussion of deceptive conduct in the standard setting context and the factors that make such conduct anticompetitive under 2 of the Sherman Act." *Broadcom*, 501 F.3d at 312. Finally, the Third Circuit cited to an instructive passage from an analogous District Court decision which stated:

> Thus, antitrust law historically has been concerned with the risk of one or a small number of participants capturing the economic power of an industry-wide standard and turning the SSO into a source of exclusionary power. Simply put, by hijacking or capturing an SSO, a single industry player can magnify its power and effectuate anticompetitive effects on the market.

Id. at 312 (citing *Rambus, Inc. v. Infinenon Techs AG*, 330 F. Supp. 2d 679 (2004)). Based upon an analysis of these authorities, the Third Circuit ultimately held that an intentionally false promise to adhere to reasonable and non-discriminatory terms set by an SDO constituted actionable anticompetitive conduct. *Id.* at 314. The Court also concluded that "Deception in a consensus-driven private standard setting environment harms the competitive process..." *Id.* In reaching its decision, the Third Circuit noted its holding "follows directly from established principles of antitrust law and represents the emerging view of enforcement authorities." *Id.* Thus, the *Broadcom* decision has set a clear legal standard, supported by ample legal precedent, which states that deception

within the confines of an SSO constitutes actionable conduct under the Sherman Act.

II. Respondents' Deceptive Conduct Requires the Imposition of Antitrust Liability

Broadcom recognized that deceptive conduct under the guise of standard setting activity violates the Sherman Act. In *Broadcom*, the deceptive conduct occurred within the context of an SSO and concerned a "patent hold-up" or unlawful monopoly. The novel legal question presented by this case is whether the *Broadcom* standard should be applied to claims alleging unlawful group boycotts or agreements to restrain trade.[3] GBT's case provides a vehicle to answer this issue in the affirmative. It is undisputed that the Respondents violated 3GPP mandates established to govern the consensus forming process.

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[3] Group boycotts have been deemed unlawful and condemned as a *per se* violation of § 1 of the Sherman Act. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 290 (1985); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961). This is because a group boycott often cuts off access to a supply, facility, or market necessary to enable the boycotted firm to compete. *Northwest Stationers*, 472 U.S. at 294 (1985). This Court's past decisions have emphasized that there are classes of restraints which, from their nature or character, are unduly restrictive and hence forbidden by both common law and statute. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 58-60 (1911). Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in this forbidden category. *Eastern State Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1945); *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

Thus, the conduct at issue here is closely analogous to the circumstances presented in *Broadcom* where the Third Circuit found that deceptive conduct posed a dangerous potential to result in antitrust harm. In addition, this Court has established that SSO members who do not adhere to organizational mandates undermine the pro-competitive benefits associated with the standard setting process. See *Allied Tube,* 486 U.S. at 500-02. Therefore, this case provides an opportunity to prevent SSO subversion by affirming a standard which recognizes antitrust liability under the Sherman Act as a matter of law.

The factual record in this case clearly identifies these established mandates which ensure the 3GPP consensus process operates in a standardized manner. It is undisputed that an offline and unsanctioned email exchange occurred whereby Respondents discussed ways to remove CPCH from the 3GPP standard. Respondents' secret communications occurred after the Scottsdale meeting and a few days prior to the Tokyo plenary session. The official report for the Scottsdale meeting contained no formal discussion of CPCH or upcoming consideration of its potential removal from the standard, as was required. Respondents have presented no evidence or argument that the email exchange was authorized by 3GPP. Nor have Respondents contested the fact that 3GPP has established mandates regarding the proper methods to request, authorize, initiate, and operate an off line session, meeting, and/or email exchange.

Respondents violated these mandates and took pre-emptive action by setting an agenda for the removal of CPCH. This discussion was intended to exclude GBT, along with most 3GPP members, from the deliberative

consensus process. The import of Respondents' violation cannot be overstated. Such deceptive conduct, in derogation of 3GPP mandates, undermines the entire process by which the standard is created and maintained. This type of SSO violation is analogous to the conduct condemned in *Allied Tube*, where this Court stated: "[w]hat petitioner may not do (without exposing itself to possible antitrust liability for direct injuries) is bias the process by, as in this case, stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition." *Allied Tube*, 486 U.S. at 511 (1988). Respondents' conduct in this case is virtually identical to that denounced in *Allied Tube*. Respondents formed a coalition, outside the confines of 3GPP, to ensure the presence of numerous decision makers at the Tokyo plenary meeting who would support the removal of CPCH. Instead of opening the discussion of CPCH to the entire body, as required by 3GPP mandates, Respondents carefully selected a group of allies to support their agenda at the Tokyo meeting, to wit: the exclusion of CPCH from the market. Such conduct is not permitted under 3GPP mandates and runs contrary to the ruling of *Allied Tube*. The proper course of conduct Respondents should have followed is set by 3GPP and was articulated in *Allied Tube*, where this Court stated: "[p]etitioner remains free to take advantage of the forum provided by the standard-setting process by presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body." *Id.* at 510. This is what Respondents should have done, namely, to give proper notice of the issue of CPCH's potential removal from the standard and then to have argued the merits of CPCH's removal before

the entire nonpartisan 3GPP body instead of subverting the rules to ensure exclusion.

Respondents' deceptive conduct is strikingly similar to the action condemned by the Third Circuit in *Broadcom*. The basis of the antitrust claim in *Broadcom* was that the underlying conduct violated fundamental SSO regulations. Here, Respondents' deceptive conduct is identical to that in *Broadcom*, as Respondents blatantly violated 3GPP mandates regarding the consensus process. The only difference is the section of the Sherman Act GBT alleges was violated. However, unlawful attempts to acquire a monopoly and the conduct of forming and carrying out a group boycott are closely related in many ways. As noted by this Court, Section 1 and Section 2 of the Sherman Act closely overlap, and "the same kind of predatory practices may show violations of all." *Maryland and Virginia Milk Producers Ass'n v. U.S.*, 362 U.S. 458, 463-64 (1960). Thus, the legal standard applied in *Broadcom* is properly applicable here, as both cases involve the subversion of an SSO through deceptive conduct which violated SSO mandates. Within this context both cases involve similar "predatory practices" condemned by this Court because of the potential for antitrust harm when SSO rules are disregarded. See, *Allied Tube*, 486 U.S. at 500-01. Accordingly, these authorities support the application of a legal standard in this case which will impose antitrust liability as a matter of law.

III. D.C. and Fifth Circuit Decisions have Created Confusion and Tension

The issue presented by this case is also ripe for review because of the recent decision reached by the

District of Columbia Circuit Court in *Rambus Inc. v. F.T.C.*, 522 F.3d 456 (D.C. Cir. 2008). In *Rambus*, the D.C. Circuit expressly rejected the *Broadcom* ruling to the extent it imposed antitrust liability for deceptive conduct within an SSO. The Court in *Rambus* also stated that the *Broadcom* ruling conflicts with this Court's decision in *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998). *Rambus Inc. v. F.T.C.*, 522 F.3d at 466. However, the *Rambus* decision failed to recognize this Court's acknowledgment of the danger posed by SSO deception and corresponding potential for antitrust harm. Moreover, the *Rambus* decision's reliance upon *NYNEX* is misplaced as the factual underpinning of *NYNEX* differed substantially from the circumstances of *Broadcom*, and of those presented here. These errors were magnified by the failure of the Fifth Circuit to address issues in this case. The resulting confusion has created tension with this Court's prior rulings and between the Courts of Appeal.

In *Rambus*, the D.C. Circuit rejected the standard stated in *Broadcom*:

> To the extent that the ruling [Broadcom] rested on the argument that deceit lured the SSO away from the non-proprietary technology, it cannot help the Commission in view of its inability to find that Rambus's behavior caused JDEC's choice. To the extent that it [Broadcom] may have rested on a supposition that there is a cognizable violation of the Sherman Act when a lawful monopolist's deceit has the effect of raising prices...it conflicts with *NYNEX*.

Rambus Inc., 522 F.3d at 466.

Rambus found deception of an SSO does not require antitrust liability unless the anticompetitive result would not have occurred "but for" the deception. If approved, such a legal tenet would undermine the processes by which standards are formed, as SSO members will be less wary of collusion. Protections against anticompetitive conduct within SSO contexts would be diminished as potential SSO conspirators would not be deterred. Furthermore, the reasoning applied in *Rambus* also reflects a failure to understand that SSOs present a uniquely dangerous opportunity for influential market players to collude and exclude competitors if they violate the rules designed to prevent such collusion. Thus, *Rambus* erroneously departs from the decision of this Court in *Allied Tube*, as it fails to fully recognize the extent of potential antitrust harms resulting from SSO subversion.

The reasoning in *Rambus* is further flawed in failing to recognize that *NYNEX* did not involve deceptive conduct within an SSO. This is an important distinction as the interplay between the SSO consensus process and the corresponding pro-competitive benefits were not at issue in *NYNEX*. The potential for antitrust harms, as identified in *Allied Tube*, were not presented by the facts of *NYNEX* making reliance on that opinion inappropriate.

Moreover, and unlike *Broadcom*, there was no evidence the monopolistic power in *NYNEX* was obtained unlawfully. In *NYNEX*, this Court held that "consumer injury naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power that is *lawfully* in the hands of a monopolist..." *NYNEX*, 525 U.S. at 136 (emphasis in original). This language from the Court's

decision drives home the point that the deception presented by *NYNEX* was not connected to the procurement of monopoly power, but rather in what was done with that power. In contrast, the evidence presented in *Broadcom* supported a finding that the "patent hold up" effected by an SSO member was the result of ongoing misrepresentations and fraudulent conduct. *NYNEX* is thus readily distinct from the circumstances of *Rambus*, *Broadcom*, and the present matter. The flawed reasoning in *Rambus* has created confusion in the Circuits regarding if and when antitrust liability can be imposed for violating the rules governing an SSO consensus process.[4] The present case provides an opportunity for this Court to address the confusion among these Circuit Court opinions.

In November 2008, the Federal Trade Commission filed a petition for writ of certiorari asking this court to review the Circuit Court's decision in *Rambus*. The FTC's petition presents the Court with an issue similar to that in *Broadcom* and this case, i.e., the proper application of antitrust law where deceptive conduct distorts the fundamental processes of an SSO. The FTC draws attention to the fact that the *Rambus* decision is at odds with the Third Circuit's ruling in *Broadcom* and, as noted above, that *Rambus's* reliance upon *NYNEX* is misplaced. The FTC warns that the tension created by the *Rambus* decision threatens confusion regarding the conduct of participants in industry-wide standard setting. The resulting risk is

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[4] In the unlikely event the court decides *NYNEX* does control, review would still be necessary to determine whether *Broadcom* creates tension with this Court's ruling.

that this confusion will inevitably discourage participation in standard setting proceedings. The FTC has asked this Court to apply the *Broadcom* standard because conduct that undermines the process through which market participants seek to achieve efficient results should constitute anticompetitive conduct as a matter of law. For the same reasons identified by the FTC, review is necessary to rectify the indecision created by the Fifth Circuit.

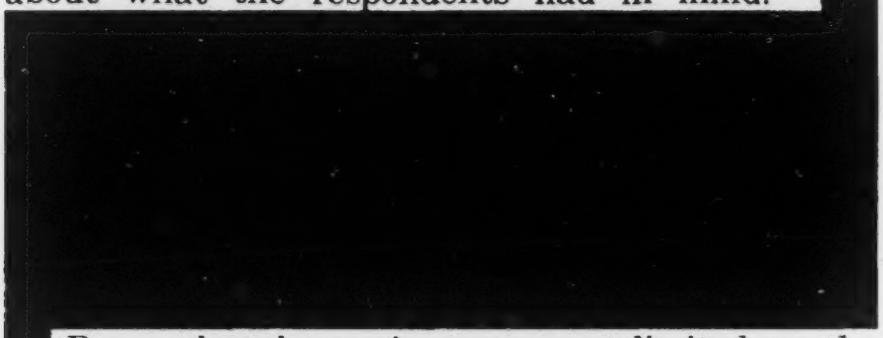
The Fifth Circuit in this case departed from or failed to recognize certain considerations on summary judgment recognized by the *Broadcom* decision. As noted by the Fifth Circuit, when analyzing whether a conspiracy claim can survive summary judgment is that: "a plaintiff seeking damages for a violation of [section] 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." See, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). See also, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Both lower courts relied upon this standard in findings that GBT did not present sufficient evidence of a conspiracy to survive summary judgment. However, the lower Courts made their determinations without considering, as presented in *Broadcom*, the issue of antitrust harms that can result from the violation of SSO rules designed to prevent collusion.

Instead, Respondents distracted the Fifth Circuit from the issue by arguing that their nefarious email exchange was innocuous SSO activity. The Fifth Circuit erroneously accepted this suggestion and only considered whether there was direct evidence of a conspiracy. For example, the Fifth Circuit stated, on several occasions, that GBT failed to present evidence

of "an explicit understanding." Pet. App. 7a. The Fifth Circuit also found that GBT's evidence did not tend to exclude "the possibility that the Appellees acted independently, motivated by a desire to improve the 3GPP standard by removing outdated and underused technologies." *Id.* at 10a. However, the Fifth Circuit failed to recognize that this is not a case involving communications by Respondents within a standard setting body. Rather, this case involves a few powerful 3GPP members secretly planning a few days prior to a large plenary session of 3GPP in Tokyo. Respondents' failure to abide by 3GPP rules should have changed the reasonable inference from GBT's evidence from "business as usual" to "tending to exclude" independent permissible behavior.

Given that these communications were in violation of 3GPP rules, the lower courts should have viewed them as direct evidence of a conspiracy. Instead, by refusing to acknowledge that the communications were in violation of the rules and considering them merely circumstantial evidence, both the District Court and the Fifth Circuit essentially heightened the standard for establishing a conspiracy in violation of the Sherman Act. The evidence GBT provided was the best and most direct evidence an antitrust plaintiff could hope to acquire being internal documents of the alleged perpetrators. Perhaps these same communications in the sanctioned 3GPP forum would merely suggest a conspiracy, but when they occur in an unsanctioned forum, the Courts should have considered them direct evidence of a conspiracy. Essentially, the lower courts here want to impose an impossible summary judgment standard that fails to consider the purpose and importance of SSO rules.

Additionally, the courts ignored and simply never considered the revealing of earlier promises of the respondents, made both jointly and separately, to eliminate CPCH from the standards, doing whatever it would take. These earlier documents speak volumes about what the respondents had in mind.



Respondents' conspiracy was not limited, as the lower courts suggest, to actions in 2005.

Respondents' undisputed violation of 3GPP mandates tends to exclude the possibility that Respondents acted independently. It also rebuts Respondents argument that the email exchange was normal standard setting activity. There is no reason for Respondents to conduct legitimate discussions relating to conduct standard setting activity outside the permissible forum unless they had ulterior motives. The Court in *Allied Tube* recognized that legitimate actors can "take advantage of the forum provided by the standard-setting process by presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body." See, *Allied Tube*, 486 U.S. at 510. Had Respondents followed this guidance, they would have placed GBT, and other CPCH supporters, on notice that they should be present in Tokyo to defend the CPCH technology. This would have led to open discussion and collaboration regarding the topic of removal. In order

to avoid this result, Respondents intentionally subverted 3GPP rules governing the consensus forming process. Such deliberate deceptive conduct must lead to antitrust liability under the standards set forth in *Broadcom* and *Matsushita*.

CONCLUSION

This case presents an issue which is ripe for consideration by this Court. Reinforcing the *Broadcom* standard is necessary to ensure the Sherman Act protects against SSO subversion. Without this standard, competitors will successfully avoid liability by disguising deceptive conduct as normal standard setting activity. Such a result would weaken the Sherman Act and increase the risk of antitrust harms posed by competitors who distort the standard setting process for exclusionary purposes. Therefore, GBT respectfully requests that this Court resolve the confusion created by *Rambus* and impose antitrust liability as a matter of law for the Respondents having violated SSO mandates.

Respectfully Submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-40954

[Filed October 23, 2008]

GOLDEN BRIDGE TECHNOLOGY INC

Plaintiff - Appellant

v.

MOTOROLA INC; ERICSSON INC; PANASONIC MOBILE COMMUNICATIONS DEVELOPMENT CORP OF USA; QUALCOMM INCORPORATED; LUCENT TECHNOLOGIES INC

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Texas

Before GARZA and ELROD, Circuit Judges, and HICKS,* District Judge.

* District Judge of the Western District of Louisiana, sitting by designation.

EMILIO M. GARZA, Circuit Judge:

Plaintiff Golden Bridge Technology, Inc. ("GBT") appeals the district court's grant of summary judgment in favor of the defendants.[1] The district court granted summary judgment against GBT's claim that the defendants unlawfully conspired not to deal with GBT in violation of the Sherman Antitrust Act. For the following reasons, we affirm.

I

Golden Bridge Technology ("GBT") develops wireless communications technology for cellular networks. Along with the Appellees, GBT is a member of a non-profit standard setting organization called Third Generation Partnership Project ("3GPP"). 3GPP institutes uniform technology standards for the telecommunications industry to ensure worldwide compatibility of cellular devices and systems. More than 260 companies belong to 3GPP, representing all levels of the cell phone industry. The 3GPP members are responsible for creating and developing the 3GPP standard, which means determining what technologies will be included in the standard as either mandatory or optional features.

GBT owns patents to Common Packet Channel technology ("CPCH"), which allows the transmittal of electronic information packets between cellular phones

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[1] The summary judgment briefing included defendants Nokia, Motorola, T-Mobile, Ericsson, Qualcomm, and Lucent. Subsequently the district court entered dismissals as to T-Mobile and Nokia, so the only appellees to this action are Motorola, Ericsson, Qualcomm, and Lucent ("Appellees").

and base stations. In 1999, 3GPP adopted CPCH as an optional feature. Optional status meant that manufacturers did not have to use CPCH, but if they chose to they had to follow the 3GPP standard to ensure compatibility with other equipment and networks. Since that time, two companies have obtained licenses to use CPCH, but neither company has field tested or implemented the technology.

Changes to the 3GPP standard occur through consensus of the individual members. Individual members are divided into Working Groups, which have different responsibilities related to developing the standard. Each Working Group belongs to one of six Technical Specification Groups, and the Technical Specification Groups are presided over at the top level by the Project Coordination Group. The Working Groups propose changes to the 3GPP standard by submitting change requests to the other Working Groups, which if approved are submitted to the relevant Technical Specification Group for decision. The opposition of a single individual member prevents approval of a change request, unless 71% of individual members attending a subsequent plenary meeting vote to adopt the change. Technical decisions are appealable to the Project Coordination Group.

At the 2004 plenary meeting for the Technical Specification Group to which GBT and the Appellees belonged, individual members wanted to simplify the 3GPP standard by removing old and unused technologies. At a subsequent Working Group meeting in Scottsdale, Arizona, two individual members presented a proposed feature clean-up list that did not include CPCH. No decision was reached, and the clean-up discussions continued via emails between

several companies in attendance at the Scottsdale meeting. These companies (including Motorola, Ericsson, and Qualcomm, but not Lucent) discussed adding CPCH to the clean-up list. No agreement was reached and they ultimately declined to include it, apparently due to concerns that its inclusion would prevent consensus. GBT did not attend this meeting and was not included on the emails.

The next plenary meeting occurred in Tokyo, Japan. Appellees all attended this meeting, but GBT did not. The proposed feature clean-up list was presented, still not including CPCH. However, an Ericsson representative spoke out in front of the entire group, suggesting adding CPCH to the clean-up list. Cingular, a previous friend of CPCH, announced support for removal. No objections arose. Discussion turned to other issues, and the chairperson of the plenary meeting requested that the members hold an offline session to obtain consensus on unresolved items. On the final day of the plenary meeting, the members presented the revised clean-up list with CPCH included. No one objected, so the Working Groups created change requests for each feature on the list. These change requests were approved at a subsequent Working Group meeting, which GBT failed to attend. At the following plenary meeting in Quebec, the change requests obtained final unanimous approval and all of the features on the revised clean-up list were removed from the 3GPP standard. GBT also failed to attend this meeting and did not appeal CPCH's removal to the Project Coordination Group.

GBT filed this lawsuit prior to the Quebec meeting, alleging a violation of the Sherman Antitrust Act, 15 U.S.C. § 1. GBT claimed that the defendants conspired

with each other to remove CPCH from the 3GPP standard, resulting in the unlawful exclusion of GBT from the market. The district court granted the defendants' motion for summary judgment, finding that GBT had failed to present any evidence of a conspiracy. GBT now appeals.

II

We review the district court's grant of summary judgment *de novo,* applying the same standard as the district court. *Fabela v. Socorro Indep. Sch. Dist.*, 329 F.3d 409, 414 (5th Cir. 2003). We view all facts in the light most favorable to the non-movant, and affirm only when the evidence "show[s] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED R. CIV. P. 56(c); *see also Coury v. Moss*, 529 F.3d 579, 584 (5th Cir. 2008).

The Supreme Court has specified what a plaintiff must show to avoid summary judgment on a Sherman Act § 1 claim:

> To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently. Respondents . . . must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). Accordingly, we

reverse the district court's grant of summary judgment only where the evidence is strong enough to reasonably exclude the possibilities of independent action and conduct consistent with permissible competition. *See Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 409 (5th Cir. 2007).

III

Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Although § 1 could be read to outlaw all contracts, it has long been interpreted to only proscribe unreasonable restraints. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007). To establish a § 1 violation, a plaintiff must prove that: (1) the defendants engaged in a conspiracy; (2) that restrained trade; (3) in the relevant market. *See Apani Sw., Inc. v. Coca-Cola Enter., Inc.*, 300 F.3d 620, 627 (5th Cir. 2002). Once a plaintiff establishes that a conspiracy occurred, whether it violates § 1 is determined by the application of either the *per se* rule or the rule of reason. *See Spectators' Commc'n Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 222-23 (5th Cir. 2001). If the court determines that the defendant's conduct "would always or almost always tend to restrict competition and decrease output," the restraint is *per se* illegal and no further inquiry occurs. *See Leegin*, 127 S. Ct. at 2713. However, if the conduct is not deemed *per se* unreasonable, the plaintiff will also have to prove that the conduct unreasonably restrains trade in light of actual market forces under the rule of reason. *Id.*

Regarding the conspiracy element, the Supreme Court recently observed that "the crucial question [in a § 1 claim] is whether the challenged anticompetitive conduct stems from independent decision or from an agreement." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (internal quotations omitted). The plaintiff must present evidence that the defendants engaged in concerted action, defined as having "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Concerted action may be shown by either direct or circumstantial evidence. Direct evidence explicitly refers to an understanding between the alleged conspirators, while circumstantial evidence requires additional inferences in order to support a conspiracy claim. *See Tunica,* 496 F.3d at 409. Independent parallel conduct, or even conduct among competitors that is consciously parallel, does not alone establish the contract, combination, or conspiracy required by § 1. *See Bell Atlantic*, 127 S. Ct. at 1964.

GBT argues that email communications between the Appellees and others following the Scottsdale meeting show a conspiracy, in the form of a group boycott, to eliminate CPCH from the 3GPP standard. The district court disagreed, granting summary judgment because GBT failed to present any evidence supporting the inference of a conspiracy. We agree.

As a threshold matter, GBT has presented only circumstantial evidence of a conspiracy. None of the emails, or any other evidence GBT presents, show an explicit understanding between the Appellees to collude and unlawfully eliminate CPCH from the standard. *Compare Tunica,* 496 F.3d at 410 (finding

that email communications show conspiracy because they contain *direct* evidence stating that the parties entered into a "gentlemen's agreement" not to deal with another company). Unlike *Tunica,* here the emails actually reveal disagreement among the Appellees. The Appellees disliked CPCH for different reasons and wanted to remove it at different times. They disagreed about the very action GBT claims constituted the conspiracy—whether to add CPCH to the clean-up list being presented at the Tokyo meeting. Viewing the evidence favorably to GBT, the emails do reveal a common dislike for CPCH among some of the Appellees and other companies. However, common dislike is not the same as an explicit understanding to conspire, so we accordingly review GBT's claim under the stricter standard required for circumstantial evidence.

To show conspiracy, circumstantial evidence must tend to exclude the possibility that the Appellees acted independently. *See Matsushita,* 475 U.S. at 587-88. However, GBT has presented no evidence refuting the possibility that the Appellees found CPCH outdated and independently supported its removal. Viewed most favorably to GBT, the evidence indicates that some of the Appellees communicated their dislike of CPCH to each other, and that each Appellee hoped CPCH would eventually be removed from the standard. However, at least one Appellee (Lucent) only expressed a desire to remove CPCH in internal company emails, and was not part of the group email discussions. This evidence amounts to an exchange of information, followed by parallel conduct when the Appellees (and over 100 other companies) unanimously voted to remove CPCH, and it does not refute the likelihood of independent action. *See Consol. Metal Prods., Inc. v. Am. Petroleum*

Inst., 846 F.2d 284, 294 n.30 (5th Cir. 1988) (noting that the mere exchange of information, or even consciously parallel action, is insufficient to establish a conspiracy under § 1). Moreover, the action that GBT alleges implemented the conspiracy—when the Ericsson representative moved to place CPCH on the clean-up list at the Tokyo meeting—occurred independently before the entire plenary body, and GBT offers no evidence indicating it resulted from any explicit agreement. On the contrary, the evidence indicates that Ericsson's action was in opposition to what some of the other Appellees wanted, due to their concerns about Cingular's allegiance to CPCH.

GBT argues that the Appellees' had economic motives to remove CPCH, demonstrating that they did not act independently. These purported motives include avoiding the payment of royalty fees to use CPCH and promoting their own competing technology. The first motive finds no support in the evidence, because none of the Appellees, and in fact no company at all, had ever paid royalties to GBT for CPCH. Further, CPCH was an optional feature in the 3GPP standard. There was no rational reason for the Appellees to conspire to unlawfully remove CPCH to avoid paying royalties, when they could simply opt not to use it. Regarding the alleged competing-technology motive, such evidence does not exclude the possibility of independent conduct. Appellees could still support CPCH's removal because they disliked it, even if they owned competing technology. In fact, the existence of an independent financial motive to remove CPCH might be an independent reason for each Appellee company to support CPCH's removal. It is not sufficient under *Matsushita* for GBT to simply propose conceivable motives for conspiratorial conduct; GBT's

evidence must tend to show that the possibility of independent conduct is *excluded*. *See Matsushita*, 475 U.S. at 587-88. GBT's evidence does not tend to exclude the possibility that the Appellees acted independently, motivated by a desire to improve the 3GPP standard by removing outdated and underused technologies.

Moreover, the Appellees presented evidence showing that these informal communications are an important part of the standard setting process, and that the 3GPP standards are beneficial to the market. We have maintained that "it has long been recognized that the establishment and monitoring of trade standards is a legitimate and beneficial function." *Consol. Metal Prods.*, 846 F.2d at 293-94 (finding that though a trade association naturally involves collective action by competitors, it is not by its nature a "walking conspiracy"). The standards 3GPP sets allow the numerous necessary components of cellular communications to operate compatibly. Potential procompetitive benefits of standards promoting technological compatibility include facilitating economies of scale in the market for complementary goods, reducing consumer search costs, and increasing economic efficiency. *See* ABA SECTION OF ANTITRUST LAW, HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING 10 (2004). We have found it "axiomatic" that a standard setting organization must exclude some products, and such exclusions are not themselves antitrust violations. *See Consol. Metal Prods.*, 846 F.2d at 294. To hold otherwise would stifle the beneficial functions of such organizations, as "fear of treble damages and judicial second-guessing would discourage the establishment of useful industry standards." *Id.* at 297. Accordingly, we decline to infer

conspiratorial action on the basis of limited circumstantial evidence, particularly where this evidence is at least as consistent with permissible competition, and with independent action, as with unlawful conspiracy. *See Matsushita,* 475 U.S. at 588.

As GBT has not met the threshold requirement of demonstrating the existence of an agreement in restraint of trade, we need not review the district court's findings as to the remaining requirements of a § 1 violation.[2]

IV

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment.

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[2] Accordingly, though we affirm the district court's ruling, our opinion should not be construed to endorse its conclusion that if GBT had shown an agreement in restraint of trade, the Appellees' conduct would be considered *per se* illegal. A proper review of that conclusion would consider whether it conflicts with *Consol. Metal Prods.*, where we held that a standard setting organization's decision not to certify a particular product did not *pe se* violate Sherman Act § 1. *See* 846 F.2d at 292.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

CASE NO. 6:06-CV-163

[Filed September 11, 2007]

GOLDEN BRIDGE TECHNOLOGY, INC.,	)
	)
Plaintiff	)
	)
vs.	)
	)
NOKIA, INC., et al.,	)
	)
Defendants	)
	)

JUDGES: LEONARD DAVIS, UNITED STATES DISTRICT JUDGE.

MEMORANDUM OPINION AND ORDER

Before the Court are Nokia, Inc., Motorola, Inc., T-Mobile USA, Inc., Ericsson, Inc., Qualcomm Incorporated, and Lucent Technologies, Inc.'s (collectively "Defendants") joint motion for summary judgment (Docket No. 184) and Golden Bridge Technology, Inc.'s ("GBT") cross-motion for partial summary judgment (Docket No. 198). Having

considered the relevant briefing, oral arguments, and the applicable law, the Court **GRANTS** Defendants' joint motion for summary judgment, **DENIES** GBT's cross-motion for partial summary judgment, and **DENIES as moot** all other pending motions (Docket Nos. 183, 193, 202, 204, 205, 206, 207, and 208).

BACKGROUND

Formed in 1995, GBT develops technology utilized in the wireless communications industry for Wideband Code Division Multiple Access ("WCDMA") systems. GBT owns patents related to wireless communications allegedly covering aspects of the 3GPP standard including Common Packet Channel ("CPCH") technology, which allows medium-sized packets of electronic information to be sent between a cellular phone and a base station.[1] These patents improve the ability of WCDMA networks to efficiently communicate and transfer medium-size data packets with higher capacity and throughput.

Defendants and GBT are members of a non-profit standard-setting organization called Third Generation Partnership Project ("3GPP"). Five regional standard-setting organizations ("Organizational Partners")[2]

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[1] U.S. Patent Nos. 6,574,267; 6,169,759 ("the '759 patent); and 6,301,286 ("the '286 patent). The '759 and '286 patents relate to the CPCH technology at issue.

[2] Association of Radio Industries and Businesses, European Telecommunication Standard Institute, T1 (replaced by Alliance for Telecommunications Industry Solutions in April 2004), Telecommunications Technology Association, and Telecommunications Technology Committee. China Wireless

formed 3GPP in 1998 to institute uniform technology standards for telecommunications systems and equipment to ensure worldwide compatibility of WCDMA devices and systems, such as mobile phones and portable data transmission devices. 3GPP seeks to create an attractive standard for network operators and cell phone users. The 3GPP standards are developed in a phased approach called Releases.

3GPP is composed of representatives from wireless telecommunications companies ("Individual Members").[3] More than 260 Individual Members belong to 3GPP representing every level of the cell phone industry. Although Organizational Partners formed 3GPP, the Individual Members drive the development of the 3GPP standard.

The Project Coordination Group is at the top of 3GPP's structure and presides over six Technical Specification Groups, which are responsible for developing, approving, and maintaining the specifications under their control. The Technical Specification Groups are subdivided into areas of responsibility. The Radio Access Network–the only relevant Technical Specification Group in this dispute–has four Working Groups, each with different responsibilities related to the technical details of developing and implementing the 3GPP standard. The Working Groups propose changes to the 3GPP

Telecommunications Standard Group joined as an Organizational Member in May 1999.

[3] A company registered as a member of an Organizational Partner and able to participate in an Organizational Partner's technical work can become an Individual Member of 3GPP.

standard by submitting Change Requests to the other Working Groups. Approved Change Requests are then submitted to the Radio Access Network for decision.

3GPP encourages decision-making by consensus. A single Individual Member's sustained opposition prevents the approval of a proposed Change Request. When consensus cannot be reached, a supermajority of 71% of Individual Members at a subsequent plenary meeting is required to approve a Change Request. Technical decisions may be appealed to the Project Coordination Group.

GBT was a member of a U.S. standard setting body that made joint submissions in 1998 to 3GPP for the initial 3GPP standard–Release 99. CPCH was included in the submission to 3GPP. In 1999, GBT became an Individual Member of 3GPP and attended meetings to lobby for the inclusion of CPCH into the 3GPP standard. As a result of its efforts, CPCH was adopted by 3GPP as an optional feature in Release 99. Thus, cellular equipment manufacturers were not required to use CPCH, but if they chose to include the technology they had to comply with the CPCH standard set out by 3GPP.[4]

At the March 2001 Radio Access Network plenary meeting, GBT submitted a proposal to make CPCH mandatory in Release 4. There was no consensus on GBT's proposal, and CPCH remained an optional

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[4] Telecommunications manufacturers that implemented CPCH were not required by law to follow 3GPP standards. However, if a manufacturer implemented CPCH it would need to follow 3GPP standards to ensure that its equipment was compatible with other telecommunications equipment and networks.

feature for Release 99 and Release 4. GBT began discussions with several companies to secure licenses covering the CPCH technology. GBT secured two licenses covering CPCH. The licensees never field tested or implemented CPCH.

The Feature Clean-up List

At the December 2004 Radio Access Network plenary meeting, Individual Members sought simplification of the 3GPP standard. As a result, at the February 2005 Working Group meeting in Scottsdale, Arizona, Nokia and Motorola presented a feature clean-up list that proposed technologies for removal from Release 5. CPCH was not included on the proposed feature clean-up list. No decision was reached, and the Working Group continued the feature clean-up at the next plenary meeting. Following the Scottsdale Working Group meeting, Nokia circulated draft Change Requests via email to several companies concerning the feature clean-up list. After some discussion, Nokia declined to add CPCH to the feature clean-up list, concerned that its inclusion might prevent consensus.

In March 2005, the Radio Access Network held a plenary meeting in Tokyo, Japan. Defendants were all represented at this meeting. GBT no longer had a representative at the 3GPP meetings and did not attend. Nokia presented a feature clean-up list of eight technologies, which did not include CPCH. A Qualcomm representative suggested adding compressed mode by puncturing, to which there was no objection. An Ericsson representative suggested adding CPCH. In response to the proposal, Cingular's representative and Vice-Chair of the Radio Access

Network stated publicly that Cingular had "been a champion of CPCH, but now we are willing to remove it from the specification." Toskala Dep. at 126:16-19, Joint Motion of Defendants for Summary Judgment, Exh. 2. There were no objections to CPCH being added to the feature clean-up list, and the discussion moved forward to other technologies.

Questions were then raised concerning the inclusion of other technologies to the feature clean-up list. Additionally, some Individual Members wanted to retain all the proposed features in Release 99 and Release 4 and only remove them from Release 5. The chairperson of the plenary meeting ended the discussion and asked Nokia to hold an offline session to obtain consensus on the unresolved items. The offline session was not recorded in the minutes of the official session.

On the final day of the plenary meeting, Nokia submitted a revised feature clean-up list. Compared to the initial feature clean-up list, the revised version also included compressed mode by puncturing, CPCH, and other technologies from some but not all uses, and proposed removal of the items only from Release 5. No one objected to the revised feature clean-up list. Having achieved consensus, Working Groups prepared Change Requests for each feature.

The Change Requests implementing the feature clean-up list were approved at the Working Group meeting in Athens, Greece in May 2005. GBT did not attend the Athens Working Group meeting. The Change Requests were then scheduled for a final vote at the June 2005 plenary meeting in Quebec. GBT informed the Radio Access Network chairperson that

GBT would attend the June 2005 Quebec plenary meeting to discuss the inclusion of CPCH in the revised feature clean-up list. GBT registered for the Quebec plenary meeting but did not attend. At the Quebec plenary meeting, no one objected to any of the Change Requests, and all of the features on the revised feature clean-up list were removed from Release 5. GBT did not appeal CPCH's removal to the Project Coordination Group.

GBT filed this complaint on May 6, 2005–before the June 2005 Quebec plenary meeting–alleging a violation of the Sherman Antitrust Act, 15 U.S.C. § 1 and state law claims for tortious interference with prospective economic advantage and unfair competition. GBT claims that Defendants conspired among themselves not to deal with GBT and to have CPCH removed from the 3GPP standard. GBT claims the removal of CPCH from Release 5 eliminated GBT's ability to market CPCH and excluded GBT and CPCH from the market by foreclosing the ability of telecommunications equipment manufacturers and network operators to implement CPCH. Defendants contend that they are entitled to summary judgment because there is no evidence of an antitrust conspiracy, GBT has not suffered any damages, and GBT's state law claims are similarly flawed.

APPLICABLE LAW

Summary Judgment Standard

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *Ragas v. Tenn. Gas Pipeline* Co., 136 F.3d 455, 458 (5th Cir. 1998). An issue of material fact is genuine if the evidence could lead a reasonable jury to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue for trial exists, the court views all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Id.; Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

If the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must assert competent summary judgment evidence of the existence of a genuine fact issue. Matsushita, 475 U.S. at 586. Mere conclusory allegations, unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994). The party opposing summary judgment is required to identify evidence in the record and articulate the manner in which that evidence supports his claim. *Ragas*, 136 F.3d at 458. "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Summary judgment must be granted if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23.

The Sherman Antitrust Act

Section 1 of the Sherman Act states that, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. To establish a Section 1 violation, a plaintiff must prove that: (1) the defendants engaged in a conspiracy, (2) that restrained trade, (3) in the relevant market. *Apani Sw., Inc. v. Coca-Cola Enter., Inc.*, 300 F.3d 620, 627 (5th Cir. 2002); *Spectators' Commc'n Network v. Colonial Country Club*, 253 F.3d 215, 220 (5th Cir. 2001); *Johnson v. Hosp. Corp. of Am.*, 95 F.3d 383, 392 (5th Cir. 1996).

1. Conspiracy

Section 1 requires a conspiracy, a necessary element of which "is a showing of concerted action on the part of the defendants." *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403 (5th Cir. Aug. 13, 2007), 2007 WL 2297464 at *3; *Johnson*, 95 F.3d at 392 ("Section one applies only to concerted action; unilateral conduct is excluded from its purview."). "There must be evidence that tends to exclude the possibility of independent action by [the defendants]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the [defendants] had a conscious commitment to a common scheme to achieve and unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 765 (1984); *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 294 n.30 (5th Cir. 1988) ("[T]he plaintiff must show that there was single plan, the essential nature and general scope of which was

known to those responsible for its implementation."). Direct evidence of concerted action "'explicitly refer[s] to an understanding between the alleged conspirators.'" *Tunica*, 496 F.3d at 409, 2007 WL 2297464 at *3 (quoting *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 762. (5th Cir. 2002)). Circumstantial evidence requires "additional inferences" to support a conspiracy claim. *Id.* "'Antitrust law limits the range of permissible inferences from ambiguous evidence in a Section 1 case'"; therefore, circumstantial evidence must be strong to allow a plaintiff to survive summary judgment. *Id.* (quoting *Matsushita*, 475 U.S. at 588). Conduct that is equally consistent with permissible competition and illegal conspiracy does not, by itself, support the inference of antitrust conspiracy. *Id.* The inference of conspiracy must be reasonable "'in light of the competing inferences of independent action or collusive action that could not have harmed' the plaintiff" *Id.* (quoting *Matsushita*, 475 U.S. at 588).

2. Unreasonably Restrained Trade

While Section 1 could be read to proscribe all contracts, it has never been interpreted literally and only proscribes those agreements that are unreasonable restraints on trade. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 289 (1985); *Consol. Metal Prods.*, 846 F.2d at 289. An unreasonable restraint of trade can be proven using either "the *per se* rule" or "the rule of reason." *See Consol. Metal Prods.*, 846 F.2d at 289. Restraints that have "such a predictable and pernicious

anticompetitive effect, and such limited potential for procompetitive benefit, . . . are deemed unlawful *per se*." *State Oil Co. v. Khan*, 522 U.S. 3, 9 (1997).

3. Relevant Market

A plaintiff alleging a Section 1 violation must prove an unreasonable restraint of trade occurred in a "particular market." *See Spectators' Commc'n Network*, 253 F.3d at 220. A relevant market has both geographic and product dimensions. *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 487 (5th Cir. 1984).

ANALYSIS

To defeat this motion for summary judgment, GBT "must establish that there is a genuine issue of material fact as to whether [Defendants] entered into an illegal conspiracy that caused [GBT] to suffer a cognizable injury." *Matsushita*, 475 U.S. at 585-86.

Sherman Act Claim

GBT argues Defendants acted in concert with each other by voting and agreeing to remove CPCH from the 3GPP standard and that Defendants encouraged others to refuse to deal with GBT by eliminating CPCH as an optional feature from Release 5. Defendants contend the revised feature clean-up list served a legitimate purpose consistent with 3GPP's goal of removing features not being used in real networks and simplifying the 3GPP standard.

1. Conspiracy

After the Scottsdale working group meeting, Nokia began an email discussion seeking contributions to the feature clean-up list to avoid "another clean up later on." Nokia e-mail thread March 2, 2005. On March 3, 2005, an Ericsson representative suggested adding feature SF512 to the feature clean-up list. The Nokia representative, acting as coordinator of the feature clean-up list, questioned if SF512 was linked to CPCH, and if so, then "we might need to reconsider the removal of SF512." Nokia e-mail thread March 3, 2005. Ericsson's representative responded:

> SF512 is obviously related to CPCH . . . once we list CPCH, we might risk that the whole effort is jeopardized. My proposal with just removing SF512 was a little more subtle way with a similar result . . . . I think we could also try to talk to Cingular next week and explain that this is not a coalition against CPCH, but rather a joint effort by the industry . . . . Forcing Cingular now to allow giving up the CPCH may be not [sic] a good way . . .

Nokia e-mail thread March 3, 2005. Nokia's representative responded "We would prefer to not propose the removal of SF512 in order to avoid endangering the whole process." *Id.* Ericsson's representative conceded and removed its suggestion of adding SF512 or CPCH to the feature clean-up list. Other companies included CPCH, SF512, and other technologies to their proposed feature clean-up lists, but likewise conceded their requests concerning CPCH and SF512 for consensus purposes. Nokia's representative distributed a proposed feature clean-up

list for the upcoming plenary meeting and stated, "SF512 is needed for CPCH and therefore we are not very comfortable in proposing the removal of this feature. The proposal could endanger a good progress in this clean up process and we would not like to take that risk." *Id.* On March 4, 2005, Nokia's representative sent a final e-mail stating in relevant part:

> As we are only proposing a removal of features, which are not used in real networks, and we are not proposing any implementation changes, this work should not by any means risk the stability of the specifications. Furthermore, by simplifying the specifications we expect that we are able to speed up the introduction of new features and completion of REL6 and future release specifications as discussed in the working group meetings.

Nokia e-mail March 4, 2005.

The email discussions following the Scottsdale working group meeting provide no evidence that Defendants had a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co.*, 465 U.S. at 768. GBT argues that "a plan was formed whereby CPCH would remain off the list and a stealth maneuver [would be] performed, at the opportune time, to facilitate removal." GBT's Resp. to Joint Motion for Summary Judgment at 2. But GBT does not provide evidence to support this argument. GBT describes Defendants' "orchestration of a plan" with "illicit exchanges" to "escape detection" as evidence of a common scheme against GBT. *Id.* at 23. But again, GBT provides only attorney argument and

no evidence to support the allegations of a conspiracy by the Defendants. *See Eason*, 73 F.3d at 1325 (conclusory allegations and unsupported speculation are not competent summary judgment evidence).

The outcome of the emails evidence disagreement rather than agreement over proposing CPCH for removal from the 3GPP standard. Nokia's representative consistently responded that it did not want to add CPCH to the proposal. The email discussions show the failed attempt of one party to include CPCH in the feature clean-up list–not a conscious commitment by the Defendants to engage in a collective conspiracy against GBT.

GBT has presented no evidence to exclude the possibility that the alleged conspirators acted independently. *See Consol. Metal Prods.*, 846 F.2d at 294 n.30. The proposal to add CPCH to the feature clean-up list occurred in public at the Tokyo Radio Access Network plenary meeting. The representative from Ericsson who made the proposal to add CPCH to the feature clean-up list is the same representative who suggested in the email discussions to remove SPF15 as a "subtle way" to de-activate CPCH. Defendants offered evidence that the Ericsson representative acted independently and did not consult with any of the other alleged conspirators. *See* Beming Dep. at 101:15-19, 103:18-104:10, Defendants' Joint Motion for Summary Judgment, Exh. 12; Fernandes Dep. at 41:2-16, Exh. 13; Willenegger Dep. at 126:2-10, Exh. 4.

Furthermore, GBT has presented no evidence that Defendants agreed among themselves in an offline session conducted at the plenary meeting to remove

CPCH from the 3GPP standard. GBT merely argues that an "unannounced attack on CPCH" occurred resulting in "modified documents" being created by the proponents of the deletion and therefore those proponents are part of the "conspiracy group." GBT's Resp. to Def. Joint Motion for Summary Judgment at 25. GBT has not pointed to any evidence to substantiate its argument; GBT again relies exclusively on attorney argument. More importantly, Defendants have presented evidence that CPCH was not even discussed at the offline session because there was already consensus on its inclusion in the feature clean-up list. *See* Toskala Dep. at 145:8-13, Joint Motion of Defendants for Summary Judgment, Exh. 2; Beming Dep. at 110:14-20, Exh. 12; Fernandes Dep. at 46:23-47:4, Exh. 13; Larbey Dep. at 128:15-17, Exh. 15. Far from being a conscious commitment to a scheme with an unlawful objective, the joint contribution of the revised feature clean-up list served a legitimate purpose consistent with 3GPP's goal of simplifying the 3GPP standard.

In addition to GBT failing to prove a conspiracy committed by Defendants, GBT has presented no evidence to suggest Defendants coerced other Individual Members to take any action against GBT. Defendants only refused to support CPCH. Prior supporters of CPCH–Samsung and Cingular–attended the plenary meeting and did not object to CPCH's inclusion on the revised feature clean-up list. Cingular publicly withdrew its support of CPCH at the plenary meeting.

Finally, Defendants did not control the process of features being removed from the 3GPP standard. There is no evidence that the removal of CPCH was

performed differently from the standard process that led to the removal of other technologies at the plenary meeting. GBT could have attended the Athens Working Group or the Quebec plenary meetings and raised technical objections but did not. GBT had the right to submit contributions, raise objections, and force the proposed removal of CPCH from Release 5 to a vote but it took none of these actions. If any one of the Individual Members–including GBT–in attendance had objected to including CPCH on the revised feature clean-up list, that objection would have prevented consensus. GBT still could have objected at the following Athens Working Group meeting or at the Quebec plenary meeting where the Change Requests were approved without objection. GBT could have appealed CPCH's removal to the Project Coordination Group, but did not do so.

There is no evidence of a common scheme among Defendants to unlawfully deprive GBT of its rights in violation of the antitrust laws. Defendants' conduct merely reflects a standard-setting organization at work. GBT's evidence fails to show a conspiracy among Defendants, and summary judgment is warranted on this ground.

2. Unreasonably Restrained Trade

Although Defendants argue that the Court should apply the rule of reason rather than the *per se* rule in determining whether the alleged restraint of trade was unreasonable, the Court has already ruled that GBT pleaded a *per se* violation. *Golden Bridge Tech., Inc. v. Nokia, Inc.*, 416 F. Supp. 2d 525, 529-32 (E.D. Tex. 2006) (Davis, J.) (order denying Defendants' motion to

dismiss). Accordingly, this element would be satisfied if GBT had proved its conspiracy allegations.

3. Relevant Market

In its Complaint, GBT pled a geographical market, the entire world: "The 3GPP standards are intended to allow cellular phones which are compatible with these standards to be usable throughout the world, including within the United States." *See* Complaint, ¶ 22.

Earlier the Court found that GBT had alleged a sufficient relevant market in its Complaint to overcome a 12(b)(6) motion to dismiss, but the Court clearly stated "a definite understanding of the market is not clear at this point in the proceedings." *Golden Bridge Tech.*, 416 F. Supp. 2d at 533. Since that time, GBT has not further defined the market, did not respond to Defendants' claim that GBT had not defined a relevant market, and has not presented any evidence of the relevant market in the summary judgment record.

A relevant market is a prima facie element of GBT's Section 1 claim. *See Apani Sw.*, 300 F.3d at 627. GBT has failed to come forward with any evidence defining the relevant market. Accordingly, Defendants are entitled to summary judgment for GBT's failure to raise a fact issue as to this element of its claim.

Damages

GBT argues it does not have to prove that the "Defendants' wrongful actions were the sole proximate cause" of GBT's alleged injury. *See Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20

(5th Cir. 1974). Defendants contend GBT must show as "a matter of fact and with a fair degree of certainty" that Defendants' conduct materially contributed to the injury. *See id.* Defendants argue GBT's injury is a result of GBT's failure to develop and market CPCH. Defendants further contend GBT never completed CPCH's development and CPCH was never field tested. Defendants argue GBT's alleged injury is purely speculative. *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1964) (holding that a damage award may not be based on speculation or guesswork).

GBT has not shown it was damaged by CPCH's removal from the 3GPP standard. Although GBT's expert opines on CPCH's value, history does not support his opinions. While CPCH was in the 3GPP standard, GBT only licensed the technology to two companies, but neither company field tested or commercialized the technology or paid GBT any royalties.[5] Accordingly, although CPCH has arguably been excluded from the market by no longer being included in the 3GPP standard, GBT has failed to show any damages caused by the exclusion. *See Golden Bridge Tech.*, 416 F. Supp. 2d at 532. Moreover, as GBT has not shown that Defendants–apart from 3GPP–were responsible for CPCH's removal, Defendants could not have caused GBT's alleged damages.

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[5] Samsung apparently paid GBT an up front fee of $100,000, but did not pay any royalties based on usage.

State Law Claims

In addition to the Sherman Act claim, GBT also brought state law tortious interference with prospective economic advantage and unfair competition claims against Defendants under the Court's supplement jurisdiction. *See* 28 U.S.C. § 1367(a). "When a court dismisses all federal claims before trial, the general rule is to dismiss any pendent claims." *Bass v. Parkwood Hosp.*, 180 F.3d 234, 246 (5th Cir. 1999); *see also Priester v. Lowndes* County, 354 F.3d 414, 425 (5th Cir. 2004). Since the Court is dismissing GBT's federal claim on summary judgment, the Court declines to exercise supplemental jurisdiction over the remaining state law claims and dismisses those claims without prejudice.

CONCLUSION

Defendants did not engage in an antitrust conspiracy, but participated in the legitimate goal of simplifying the 3GPP standard. Further, GBT has failed to show that Defendants' conduct caused GBT any damages.

For the reasons discussed above, the Court **GRANTS** Defendants' joint motion for summary judgment, **DENIES** GBT's cross-motion for partial summary judgment, and **DENIES as moot** all other pending motions. The Court declines to exercise supplemental jurisdiction over the remaining state law claims. Accordingly, the remaining state law claims

are **DISMISSED without prejudice.** Defendants are entitled to their costs as the prevailing parties.[6]

So ORDERED and SIGNED this 10th day of September, 2007.

/s/
LEONARD DAVIS
UNITED STATES DISTRICT JUDGE

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[6] The Court encourages the parties to review its recent opinions in *Halliburton Energy Services, Inc. v. M-I, LLC*, 244 F.R.D. 369 (E.D. Tex. June 20, 2007) (Davis, J.) (currently available at 2007 WL 1765642) and *Maurice Mitchell Innovations, L.P. v. Intel Corp.*, 491 F. Supp. 2d 684 (E.D. Tex. June 20, 2007) (Davis, J.) regarding bills of costs. If, after reviewing the law as stated in those orders, there is any area of disagreement related to Defendants' Bills of Costs, the parties should meet, confer, and be prepared to compromise making every effort to submit an "agreed" bill of costs to the Court.

APPENDIX C

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS MARSHALL DIVISION

CASE NO. 2:05-CV-170

[Filed February 17, 2006]

GOLDEN BRIDGE TECHNOLOGY, INC.	)
	)
Plaintiff	)
	)
vs.	)
	)
NOKIA, INC., et al.	)
	)
Defendants	)
	)

MEMORANDUM OPINION AND ORDER

Before the Court is Nokia, Inc.; Motorola, Inc.; T-Mobile USA, Inc.; Ericsson, Inc.; Panasonic Mobile Communications Co. LTD; NTT Docomo, Inc.; Qualcomm Incorporated; and Lucent Technologies, Inc.'s (collectively "Defendants") Joint Motion to Dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim and under 12(b)(1) for lack of subject matter jurisdiction

(Docket No. 49). For the reasons discussed below, the Court **DENIES** Defendants' Motion.

BACKGROUND

Defendants and Golden Bridge Technology Inc. ("GBT") are members of a non-profit standard setting organization called Third Generation Partnership Project ("3GPP"). 3GPP is composed of representatives from wireless telecommunications companies from all over the world. 3GPP was created to institute uniform technology standards for telecommunications systems and equipment to ensure worldwide compatibility of Wideband Code Division Multiple Access ("WCDMA") devices and systems.

GBT develops technology utilized in the wireless communications industry, specifically for WCDMA systems. GBT owns the patent to a technology called Common Packet Channel ("CPCH"), which allows medium-sized packets of electronic information to be sent between a cellular phone and a base station. In 1999, CPCH was adopted by 3GPP as an optional part of the 3GPP standard. This meant that manufacturers of cellular equipment were not required to use CPCH, but if they chose to include the technology they had to comply with the CPCH standard set out by 3GPP.[1]

GBT alleges that after the issuance of its patents covering CPCH technology it began discussions with

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[1] Telecommunications manufacturers that implemented CPCH were not required by law to follow 3GPP standards. However, if a manufacturer implemented CPCH it would need to follow 3GPP standards to ensure that its equipment was compatible with other telecommunications equipment and networks.

several Defendants to secure licenses of the technology. In March 2005, the 3GPP Technical Standards Group met at a meeting in Tokyo, Japan. Defendants were all represented at this meeting. However, GBT was not in attendance. At the meeting, most of the Defendants were participants in the "Feature Clean Up Committee" that decided which technologies would be proposed for removal from the standard. Allegedly, CPCH was added to the list of features for removal as a result of an "offline session" involving Defendants. The contents of this "offline session" were not recorded in the minutes of the official session. GBT claims that Defendants conspired among themselves not to deal with GBT and to have CPCH removed from the 3GPP standard. GBT contends that Defendants sought to remove CPCH from the 3GPP standard to prevent having to pay royalties to GBT for its technology and to ensure that network operators would be unable to demand the equipment from Defendants. GBT claims it was not given any prior notice that CPCH would be considered for deletion at the March meeting.

GBT filed this complaint on May 6, 2005 alleging a violation of the Sherman Antitrust Act, 15 U.S.C. § 1 and state law claims for tortious interference with prospective economic advantage and unfair competition. 3GPP approved the recommendation for deletion of CPCH from the standard at a plenary session in Quebec, Canada on June 1-3, 2005. GBT claims the removal of CPCH from the 3GPP standards eliminated GBT's ability to market CPCH and excluded GBT and CPCH from the market by foreclosing the ability of telecommunications equipment manufacturers and network operators to implement CPCH. GBT claims that Defendants'

actions exemplify a classic group boycott or concerted refusal to deal constituting a *per se* violation of § 1 of the Sherman Antitrust Act ("Sherman Act"). Defendants contend that GBT has not asserted a claim under the Sherman Act because GBT has not alleged that Defendants engaged in a conspiracy, the *per se* rule does not apply to standard setting activities such as those at issue in this case, GBT has not defined a relevant market, and GBT lacks antitrust standing because it has not pled an antitrust injury.

STANDARD OF REVIEW

Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is appropriate where a party fails to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6). In ruling on a Rule 12(b)(6) motion to dismiss, a court construes the complaint in favor of the plaintiff and all facts pleaded are taken to be true, no matter how improbable those facts. *See Neitzke v. Williams*, 490 U.S. 319, 327 (1989); *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). However, "in order to avoid dismissal for failure to state a claim . . . a plaintiff must plead specific facts, not mere conclusory allegations." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). A court "will thus not accept as true conclusory allegations or unwarranted deductions of fact." *Id.*

THE SHERMAN ANTITRUST ACT

Section 1 of the Sherman Act states that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." To establish a § 1 violation, a plaintiff must prove that: (1) the defendants engaged in a conspiracy, (2) the conspiracy had the effect of restraining trade, and (3) trade was restrained in the relevant market. *Apani Sw., Inc. v. Coca-Cola Enter., Inc.*, 300 F.3d 620, 627 (5th Cir. 2002); *Spectators' Comm. Network Inc. v. Colonial Country Club*, 253 F.3d 215, 220 (5th Cir. 2001); *Johnson v. Hosp. Corp. of Am.*, 95 F.3d 383, 392 (5th Cir. 1996).

1. Conspiracy

Defendants argue GBT has not alleged that Defendants engaged in a conspiracy. Defendants contend they did not conspire against GBT but only made recommendations as participants of the Feature Clean Up Committee at the March 2005 meeting in Tokyo. GBT alleged Defendants engaged in a conspiracy at the March 2005 meeting:

> 42. Defendants acted in concert with each other by voting and/or agreeing to remove CPCH from the next release of the 3GPP technical standards, without notice, without technical justification, and without a replacement, for the purpose of injuring and interfering with GBT's business, in part because of GBT's efforts to obtain favorable licenses for its technology.

. . . .

46. At the March 9-11 3GPP meeting, Defendants combined and conspired to refuse to deal with GBT with respect to CPCH, and encouraged others to refuse to deal with GBT by eliminating CPCH as an optional standard for 3GPP technology, contrary to Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1.

GBT sufficiently alleges that Defendants engaged in a conspiracy to overcome a 12(b)(6) motion to dismiss. This is especially true since GBT has not been able to conduct extensive discovery at this point in the proceedings to determine exactly what occurred among the Defendants prior to and during the March 3GPP meeting in Tokyo.

2. Unreasonable Restraint of Trade

a. Applicable law

An action must be deemed an unreasonable restraint of trade to violate § 1 of the Sherman Act. *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 289 (1985). An unreasonable restraint of trade can be proven using either "the *per se* rule" or "the rule of reason." *See Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 289 (5th Cir. 1988). Under the rule of reason analysis a plaintiff must "show that the defendants' actions amounted to a conspiracy against the market—a concerted attempt to reduce output and drive up prices or otherwise reduce consumer welfare." *Id.* at 293-92. A plaintiff must establish two elements

related to an anticompetitive conspiracy under the rule of reason: "(1) that the defendant engaged in some form of joint action, and (2) that this joint action amounted to an unreasonable restraint of trade." *Id.* at 293. An unreasonable restraint of trade can be established by proving either an unlawful purpose or an anticompetitive effect. *Id.* at 294. In *Northwest Wholesale Stationers*, the Supreme Court stated that claims under § 1 of the Sherman Act are subject to the rule of reason analysis

> unless the challenged action falls into the category of "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."
>
> . . . .
>
> . . . The decision to apply the *per se* rule turns on "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'"

472 U.S. at 289-90 (internal citations omitted)(quoting *N. Pac. R.R. Co. v. United States*, 356 U.S. 1, 5 (1958); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979)).

GBT has only alleged a *per se* violation of § 1 of the Sherman Act. Defendants also argue that GBT has not pleaded facts sufficient to state a *per se* violation of § 1. Defendants argue the *per se* rule is inapplicable in this situation and that the rule of reason should be applied.

b. Pleading a per se *violation*

As pled, Defendants' actions exemplify a classic group boycott constituting a *per se* violation of § 1 of the Sherman Act. In *Northwest Wholesale Stationers*, the Supreme Court stated that it "has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Act." *Id.* at 293. The Supreme Court further stated that "there is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine." *Id.* at 294. The Court continued, "cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'" *Id.* "In these cases the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, . . . and frequently the boycotting firms possessed a dominant position in the relevant market." *Id.* (internal citations omitted). GBT alleges that Defendants combined and conspired to refuse to deal with GBT with respect to CPCH and encouraged others to refuse to deal with GBT by eliminating CPCH from the 3GPP

standard in violation of § 1 of the Sherman Act. GBT alleges this violation has cut off its access to the market. GBT has alleged a classic *per se* group boycott.

c. Applicability of the per se *rule to standard setting organizations*

Defendants argue that all standard setting cases are judged under the rule of reason and not the *per se* rule. Defendants cite *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) arguing that lower courts only apply the rule-of-reason analysis to product standard setting by private associations. Defendants interpret the Court's language in *Allied Tube* to wholly exclude the application of the *per se* rule in any case involving a private standard setting organization. When read in its entirety, the language relied on by Defendants reveals a less definite rule than Defendants suggest. In *Allied Tube*, the Court, while discussing the application of antitrust immunity under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), stated in dicta:

> There is no doubt that the members of [private standard setting] associations have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of

> antitrust scrutiny. When, however, private associations promulgate safety standards based on the merits of objective expert judgment and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that has led most lower courts to apply the rule-of-reason analysis to product standard-setting by private associations.

Allied Tube, 486 U.S. at 500-01 (internal citations and footnotes omitted). Here, the Court is discussing the application of the *per se* rule to private associations promulgating safety standards for products, as well as certain procedures that lend credibility to private standard setting associations. It is not clear whether the Court is referring to all private standard setting associations or just those that set safety standards for products. Furthermore, the Court states that "most," not all, lower courts have applied the rule of reason analysis based on the procedural safeguards. Thus, the Court's language does not create a hard and fast rule excluding the application of the *per se* rule to all private standard setting organizations.

Additionally, the present case is distinguishable from *Allied Tube* in that it is not a case against a private standard setting association. GBT does not allege that 3GPP's actions were anticompetitive or that its actions were illegal. GBT does not allege that 3GPP itself violated § 1 of the Sherman Act. Instead, GBT alleges that Defendants excluded CPCH from the market by conspiring to use their influence in 3GPP to

remove CPCH from the 3GPP standards. The fact that the alleged § 1 violation arises within the context of a standard setting organization does not by itself prevent the application of the *per se* rule.

Defendants also rely on the Fifth Circuit's holding in *Consolidated* to argue that the Court should not apply the *per se* rule in the present case. *Consolidated* is also distinguishable from the present case in several respects. In *Consolidated*, the plaintiff Consolidated Metal Products, Inc. ("Consolidated") alleged that the American Petroleum Institute ("API"), a petroleum industry trade association, violated § 1 of the Sherman Act by delaying trade standard certification of sucker rods manufactured by Consolidated.[2] 846 F.2d at 286. API is the only standard setting body for oil field equipment in the United States. *Id.* Equipment manufacturers apply to API for product approval and to receive a license to display the API monogram on their equipment. *Id.* The monogram indicates to purchasers that the product complies with API specifications. *Id.* In holding that the *per se* rule did not apply, the Fifth Circuit stated, "Consolidated complains of lost sales but fails to allege that sucker rod users are in some way constrained from buying its products. Indeed, Consolidated admits that, before the demand for domestically-produced oil fell, it was able to sell a substantial amount of its rods." *Id.* at 291-92. In holding that the *per se* rule did not apply the court further stated:

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[2] Sucker rods are equipment used in the oil industry to pump oil from wells that have low levels of natural pressure. 846 F.2d at 286.

> A trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not *per se* violate section 1 when, for whatever reason, it fails to evaluate a product favorably to the manufacturer. Here, denial of API certification in no real sense "excludes"Consolidated from the market: without certification, Consolidated admits that it is still free to sell its products and consumers are free to buy them.

Id. at 292. The court, giving significant weight to the absence of an exclusionary effect on Consolidated's ability to sell its rods in the market, stated, "Consolidated does not allege that consumers are somehow unable to use its rods as they would API-monogrammed rods. Thus, Consolidated offers no evidence of a *per se* violation of section 1." *Id.*

API and 3GPP are different types of standard setting organizations. In *Consolidated*, API approved products to indicate to consumers that a certain product met API's standard of quality. In the present case, 3GPP sets standards throughout the entire wireless communications industry to insure compatibility of equipment. If telecommunications equipment is not in compliance with 3GPP standards it will not be compatible with the telecommunications networks and other equipment. Accordingly, it will essentially be useless. Although GBT can still offer to sell CPCH technology in theory, in reality no one will purchase it because it would make their equipment incompatible with other cellular communications equipment. 3GPP's standards are not just a "stamp of approval" but potentially have an exclusionary effect on GBT's access to the market. Furthermore, unlike

Consolidated, consumers arearguably unable to use CPCH because it has been excluded from the 3GPP standard. In *Consolidated*, API's approval improved oil field equipments' marketability, but unapproved products were not excluded from the market and could be effectively used by consumers. GBT is allegedly excluded from selling CPCH to consumers because the 3GPP standard determines what cellular communications technology will, or will not, be used in the industry. A technology not included in the 3GPP standard is unsaleable because manufacturers of cellular communications equipment and network operators will not implement technology that is not compatible with the standard. Unlike the situation in *Consolidated*, CPCH is arguably excluded from the market by not being a part of the 3GPP standard.

Courts have identified certain situations where the application of the *per se* rule to standard setting organizations is not appropriate. However, the present case is distinguishable from these situations. The *per se* rule can apply to a standard setting organization such as 3GPP. GBT has appropriately alleged a *per se* violation in this context.

3. Relevant Market

There is limited guidance from the Fifth Circuit as to whether a plaintiff alleging a *per se* group boycott violation under § 1 of the Sherman Act must define a relevant market. Although the court did not discuss the relevant market element in detail, in *Spectators' Communication Network*, the Fifth Circuit held that a plaintiff alleging a *per se* group boycott violation under the Sherman Act must prove an unreasonable

restraint of trade occurred in a "particular market." *See* 253 F.3d at 220.

Defendants claim that GBT has not defined a relevant market. Although GBT contends it does not need to define a relevant market, it claims it has done so. A relevant market has both geographic and product dimensions. *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 487 (5th Cir. 1984). GBT alleges that it pled a geographical market, the entire world: "The 3GPP standards are intended to allow cellular phones which are compatible with these standards to be usable throughout the world, including within the United States." (Complaint, ¶ 22). Furthermore, GBT claims it pled a relevant product market, cellular communication technology: "All of the foregoing companies compete with one another in the market for cellular communications products, including WCDMA equipment, and are competitors with each other and with GBT with respect to technology to be used in cellular communications products." (Complaint, ¶ 30). GBT contends that the cellular communications technology product market includes technology and equipment used to allow one person to place a call on his or her cellular phone and talk with someone else regardless of the brand of equipment the caller, network operator, and receiver are using. Defendants claim that this is not a definite market because it includes technologies that are not interchangeable with, or substitutes for, CPCH.[3]

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[3] Defendants cite *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620, 628 (5th Cir. 2002), for the proposition that a relevant market must be defined "with reference to the rule of reasonable interchangeability and cross-elasticity of demand." The Court recognizes the Supreme Court and Fifth Circuit's

Defendants argue that because a relevant market must begin with the product at issue, and CPCH is not "interchangeable" with any other product, the relevant market begins and ends with CPCH. Accordingly, Defendants contend that GBT cannot define a relevant market.

Although a definite understanding of the market is not clear at this point in the proceedings, Defendants' definition of the relevant market is too narrow. GBT has alleged a sufficient definition of the relevant market to overcome a 12(b)(6) motion to dismiss for failure to state a claim.

4. Antitrust Standing

Defendants claim that GBT does not have antitrust standing because it has not alleged an antitrust injury. *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 422 (5th Cir. 2001) (considering "the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws (antitrust injury)" to determine whether a plaintiff has antitrust standing). GBT alleges that Defendants' conspiracy caused GBT's antitrust injury, the loss of licensing revenues, in that CPCH would have been licensed had Defendants not excluded

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application of this standard when defining a relevant market in some cases, particularly those involving alleged violations of § 2 of the Sherman Act. However, the Court is unaware of any Supreme Court or Fifth Circuit cases applying this standard to a *per se* group boycott violation analysis under § 1 of the Sherman Act. The application of the standard is also complicated by the fact that CPCH is a patented technology, which by its nature does not have direct product competition within its market.

CPCH from the 3GPP standard. Defendants contend that GBT had not licensed CPCH to any company before its elimination from the 3GPP standard and, therefore, could not have suffered an antitrust injury at the hands of Defendants because CPCH had no market.

Defendants argue *Sony Electronics, Inc. v. Soundview Technologies, Inc.*, 281 F. Supp 2d 399, 402-03 (D. Conn. 2003) is analogous in that the alleged antitrust violation was not the proximate cause of GBT's loss and, therefore, no antitrust injury exists. *Sony Electronics* is neither authoritative nor on point with the present case. In *Sony Electronics*, the plaintiff, Soundview Technologies, Inc. ("Soundview"), patented a process for blocking the content of television programming. *See id.* at 401. Sony Electronics, Inc. ("Sony") and other television manufacturers initiated a declaratory judgment action that it did not infringe Soundview's patents. *Id.* Subsequently, Soundview brought a counterclaim for antitrust violations against Sony and other television manufacturers alleging that they conspired to fix licensing fees and refused to deal with Soundview. *See id.* The court held that Soundview had not established an antitrust injury because it had not proven that any television manufacturer needed a license from Soundview to manufacture televisions in compliance with FCC and industry standards for program content blocking. *See id.* at 402. Because Sony and the other manufacturers did not need a license to produce televisions in compliance with FCC and industry standards for program content blocking, there was no proximate cause between Soundview's alleged conspiracy and its claimed loss of licensing revenues. *See id.* at 403.

The present case is distinguishable from *Sony Electronics* in that any entity wanting to use CPCH technology in its cellular communications equipment would have to conform to the 3GPP standard of which CPCH was a part. Therefore, to comply with the 3GPP standard any entity wanting to integrate CPCH would necessarily need to obtain a license from GBT. It is difficult to determine exactly what would have occurred had CPCH remained a part of the 3GPP standard. However, GBT has adequately alleged that their antitrust injury was proximately caused by Defendants' alleged antitrust violations. Therefore, GBT has plead sufficient facts to establish antitrust standing.

LUCENT TECHNOLOGIES' SEPARATE REPLY

Lucent Technologies ("Lucent") filed a separate reply to GBT's Response in Opposition to Defendants' Motion to Dismiss. Lucent claims that it should be dismissed from the case because it did not participate in the "Feature Clean Up Committee" that recommended removing CPCH from the 3GPP standard at the March 2005 meeting in Tokyo. Lucent argues that GBT claims participation on this committee was the sole wrongful activity giving rise to its claims.

It is not disputed that Lucent was not a participant in the "Feature Clean Up Committee" that made the official recommendation to remove CPCH from the 3GPP standard. However, GBT alleges in its Complaint that Defendants, including Lucent, "combined and conspired to refuse to deal with GBT with respect to CPCH, and encouraged others to refuse to deal with GBT by eliminating CPCH as an optional

standard for 3GPP technology." GBT states in its Complaint that the decision to add CPCH to the list of features to be deleted was "the outcome of an offline session" and not something that took place during the official session on the record. GBT alleges that Lucent combined and conspired with the other Defendants in violation of § 1 of the Sherman Act. The fact that Lucent did not participant in the "Feature Clean Up Committee" does not mean that it was not a part of the alleged conspiracy. Lucent was present at the Tokyo meeting in March of 2005 where the alleged conspiracy occurred. GBT alleges that Lucent took part in that alleged conspiracy. Accordingly, at this point in the proceedings GBT has pled sufficient facts to overcome a motion to dismiss for failure to state a claim with regard to Lucent.

STATE LAW CLAIMS

Defendants ask that the Court dismiss GBT's state law claims for lack of jurisdiction or, alternatively, for failure to state a claim. Both of Defendants' arguments are dependent upon the Court's dismissal of the § 1 claims under the Sherman Act. For the reasons discussed above, the Court is not dismissing the claim under § 1. Accordingly, the Court will not dismiss the state claims for lack of jurisdiction or failure to state a claim.

CONCLUSION

For the reasons discussed above, the Court **DENIES** Defendants' motion to dismiss for failure to state a claim.

So ORDERED and SIGNED this 17th day of February, 2006.

/s/
LEONARD DAVIS
UNITED STATES DISTRICT JUDGE

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(2)

No. 08-1072

FILED
MAR 25 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

GOLDEN BRIDGE TECHNOLOGIES INC.,
PETITIONER,

v.

MOTOROLA INC.; ERICSSON INC.; QUALCOMM INCORPORATED; AND LUCENT TECHNOLOGIES INC.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether, as the Fifth Circuit Court of Appeals and district court held, summary judgment in favor of Respondents was warranted because Petitioner failed to present evidence creating a genuine issue of material fact as to the existence of the alleged conspiracy among certain members of the Third Generation Partnership Project, a standard-setting organization, to remove Petitioner's technology from a wireless telecommunications standard.

PARTIES TO THE CASE AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondents, Motorola Inc. ("Motorola") and Qualcomm Incorporated ("Qualcomm"), are publicly traded companies with no parent companies. No publicly held company owns more than 10% of the stock of Motorola or Qualcomm. LM Ericsson Telefonaktiebolaget is a publicly traded company that owns more than 10% of the stock of Respondent Ericsson Inc. ("Ericsson"). Alcatel-Lucent is a publicly traded company that owns more than 10% of the stock of Respondent Lucent Technologies Inc. ("Lucent").

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OPINIONS BELOW

The court of appeals' opinion is reported at 547 F.3d 266 and reprinted in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1a-11a. The opinion of the district court is unreported, and reprinted at Pet. App. 12a-31a.

JURISDICTION

The court of appeals' judgment was entered on October 23, 2008. The Petition for Writ of Certiorari ("Petition") was filed on January 21, 2009, and placed on the docket on February 23, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C. § 1, provides in relevant part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is . . . illegal."

COUNTERSTATEMENT OF THE CASE

A. Introduction

This case does not present the legal issue Petitioner has asked this Court to review. Petitioner never made any argument below based on or related to the Third Circuit's opinion in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007), the D.C. Circuit's opinion in *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008), *cert. denied*, --- U.S. ---, No. 08-694, 2009 WL 425102 (Feb. 23, 2009) or, more generically, about deceptive conduct in standard setting organizations. Indeed, Petitioner's "Question Presented" about the antitrust

significance of "deceptive" conduct was not raised below and thus is not properly before this Court. This case is from a legal perspective mundane: Petitioner advanced below a garden-variety conspiracy theory about a group of companies that supposedly conspired outside the rules of a standard setting organization to convince the organization to stop supporting Petitioner's technology. That claim was rejected by the district court and court of appeals because there was no credible evidence of conspiracy. The Fifth Circuit avoided all of the legal issues before it because the absence of any triable evidence of the alleged conspiracy rendered them all moot. There is no reason for a third court to review these facts, least of all this Court.

B. Factual Background

The dispute in this case centers on the removal of a technical specification for a technology called Common Packet Channel ("CPCH") from the third generation ("3G") wireless telecommunications standard established by the Third Generation Partnership Project ("3GPP"), a formal standard-setting body. Petitioner, Golden Bridge Technology ("GBT"), filed suit against a handful of the more than 250 companies belonging to 3GPP, alleging that these companies conspired to remove CPCH technology from the 3GPP standard in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Four companies remain in the litigation: Motorola Inc. ("Motorola"), Ericsson Inc. ("Ericsson"), Qualcomm Incorporated ("Qualcomm") and Lucent Technologies Inc. ("Lucent").

* * *

3GPP is a non-profit standard-setting organization that institutes uniform technology standards for 3G cellular phones and systems, to allow the numerous necessary components of cellular communications systems to interoperate. Pet. App. 2a, 10a. The rulings below ably describe the manner in which 3GPP sets technology standards. Pet. App. 2a-3a, 13a-15a. For purposes of addressing Petitioner's arguments for certiorari, two aspects of the standard-setting process bear special attention.

First, there are over 250 member companies in 3GPP, representing every level of the cellular telephone industry, and those member companies collaborate and assume joint responsibility for making technical contributions and proposals regarding what should (and should not) be in the standard. Pet. App. 2a. As is the norm in many standard setting organizations, informal collaboration, small group discussions, and email communications among 3GPP members are encouraged because that is how 3GPP does most of its work. Pet. App. 10a. In the words of the court of appeals, "[Respondents] presented evidence showing that these informal communications are an important part of the standard setting process." *Id.* Such informal collaborations often result in "joint contributions" to 3GPP—proposals by multiple members of 3GPP to include technology in or remove technology from the standard.

Second, as a safeguard against the possibility that a small group of companies might subvert the standard-setting process, 3GPP meetings are open to all members and 3GPP makes standard-setting decisions through consensus and, if consensus cannot be reached, supermajority voting. Pet. App. 3a. The sustained

opposition of even a single 3GPP member to a proposal to change the 3GPP standard will prevent consensus and force a vote. *Id.* In such a case, a vote of all individual members present at a formal 3GPP meeting is held with each member having one vote. *Id.* A 71% supermajority must vote in favor of the change for it to be adopted. *Id.*

Petitioner developed CPCH, a technology that allows the transmittal of data packets between a cellular phone and a wireless network. Pet. App. 2a-3a. In 1999, 3GPP adopted CPCH as an "Optional Feature" in its standard. Pet. App. 3a. CPCH's "optional" status meant that cellular equipment manufacturers were not required to use the technology, but if they chose to use CPCH, they had to implement it according to the applicable 3GPP specifications to be in compliance with the standard. *Id.* From 1999 through 2004, Petitioner could and did try to convince industry members to adopt CPCH, but no one was obligated to do so. Pet. App. 3a, 15a-16a. In fact, not one company in the wireless communications industry—anywhere in the world—implemented CPCH during this five-year period. *See id.* Thus, by the time events relevant to Petitioner's conspiracy claim commenced, the market had decided CPCH's fate.

In 2004, at a 3GPP plenary meeting, several members proposed improving the 3GPP standard by "cleaning-up" the specifications, *i.e.*, removing obsolete and unused technologies. Pet. App. 3a. Petitioner was not in attendance; it had significantly curtailed its business operations by that time, and had long ago stopped attending 3GPP meetings. Pet. App. 3a-4a, 16a. Following the proposal, a "Feature Clean-Up" process began in earnest. Pet. App. 3a-4a. In

February 2005, during a 3GPP working group meeting, Nokia and Motorola presented a draft feature clean-up list that included eight technologies that might be removed from the standard. Pet. App. 3a, 16a. CPCH was not included in this initial feature clean-up list. Pet. App. 3a. Action on the proposed clean-up list was deferred to the next plenary meeting, which was scheduled to take place a month later in Tokyo, Japan. Pet. App. 3a-4a, 16a.

Discussions related to feature clean-up continued in the month between the February working group meeting and the March plenary meeting. The medium was email exchanges, in which 3GPP members debated the technical merits of technologies proposed for removal from the standard. Pet. App. 3a-4a. Nokia circulated an email to several companies with a draft list of technologies to be considered for a joint feature clean-up proposal. Pet. App. 4a, 16a. That email was sent to many companies not named as defendants in this case, and to Respondents Motorola, Ericsson, and Qualcomm. Pet. App. 4a. It was not sent to Respondent Lucent. *Id.* Several companies replied to Nokia's email, suggesting possible additions to the clean-up list. Pet. App. 4a, 23a-25a. It was in this context that NTT DoCoMo (a Japanese mobile telephone operator) proposed adding CPCH to the clean-up list because there was no commercial interest in it. *See* Pet. App. 4a, 23a-24a. Not all companies agreed with NTT DoCoMo's proposal, however. *See id.* Ultimately, because Nokia was concerned that the inclusion of CPCH might prevent reaching consensus as to feature clean-up generally, CPCH was not included in the joint contribution. Pet. App. 4a, 24a.

In March 2005, the Tokyo plenary meeting was held. Pet. App. 4a, 16a. Again Petitioner was not in attendance. *Id.* On the first day of the meeting, Nokia presented the joint proposal on feature clean-up, which did not include CPCH. Pet. App. 4a. Then, during the formal plenary session, an Ericsson representative acting independently stood up at an open microphone in front of all of the assembled members of 3GPP and suggested adding CPCH to the clean-up list. Pet. App. 9a, 25a. None of the 3GPP members in attendance objected to Ericsson's suggestion. Pet. App. 4a. Even the representative from Cingular Inc., the 3GPP member that had historically been most supportive of CPCH, supported its removal from the standard. Pet. App. 16a-17a. It was thus through consensus at a formal 3GPP meeting that CPCH was added to the feature clean-up list. Pet. App. 8a, 18a. A revised joint contribution including CPCH was thereafter approved by all 3GPP members in attendance at the Tokyo plenary meeting. Pet. App. 4a.

The approval of the revised clean-up list at the Tokyo plenary meeting did not remove CPCH from the 3GPP specification: there needed to be a formal vote at the *next* plenary meeting, scheduled for June 2005 in Quebec, Canada. Pet. App. 4a, 17a-18a. Petitioner learned of the proposal to remove CPCH in the interim and filed this lawsuit before the Quebec meeting. Pet. App. 4a-5a. Petitioner did not attend the Quebec plenary meeting at which the formal vote on the proposal to remove CPCH was taken. Pet. App. 4a. Without opposition, the request to remove CPCH from the 3GPP standard received final unanimous approval from the 3GPP members in attendance. Pet. App. 4a, 18a.

C. District Court Proceedings

The decisions below rest entirely on a failure of proof as to the element of conspiracy. Before the district court, Petitioner did not allege a conspiracy of the standard setting organization itself. Instead, it alleged a kind of "*ultra vires*" conspiracy that took place outside of formal 3GPP meetings. The claim evolved over time. At first, GBT's counsel represented to the district court that the decision to remove CPCH from the 3GPP standard was made outside the normal standard-setting process and that "'these Defendants acted in the ... proverbial smoke-filled room.'" Respondents' Fifth Cir. Br. 3 (filed Jan. 23, 2008) (citation omitted) (omission in original). Then Petitioner learned that CPCH was put on the feature clean-up list as a result of a proposal made to, and action taken at, a formal 3GPP meeting. Petitioner adapted its claim, and thereafter argued that Respondents and a few others acted *in advance of the plenary meeting* to orchestrate CPCH's removal. Pet. App. 18a, 22a. Petitioner claimed this conspiracy was established by email communications. Pet. App. 24a-25a.

Respondents jointly moved for summary judgment on the ground that there was no triable issue of conspiracy. Pet. App. 12a, 18a. The district court granted Respondents' motion, holding that "[t]here [was] no evidence of a common scheme among [Respondents]." Pet. App. 27a. In particular, the district court noted that the emails which Petitioner relied on in support of its argument that Respondents "'orchestrat[ed] ... a plan'" and engaged in "'illicit exchanges'" to "'escape detection'" did not establish any conspiracy. Pet. App. 24a-25a (citation omitted).

To the contrary, the district court found that the emails demonstrated "disagreement" among the Respondents. Pet. App. 25a. Further, the district court's review of the evidence confirmed that "[Respondents] participated in the legitimate goal of simplifying the 3GPP standard," and that this "conduct merely reflect[ed] a standard-setting organization at work." Pet. App. 27a, 30a. The district court concluded that "[Petitioner's] evidence fail[ed] to show a conspiracy among [Respondents], and summary judgment [was] warranted on this ground." Pet. App. 27a.

D. Fifth Circuit Proceedings

Petitioner argued before the Fifth Circuit that the district court erred in granting summary judgment in favor of Respondents because the "email communications between the [Respondents] and others following the Scottsdale meeting show[ed] a conspiracy, in the form of a group boycott, to eliminate CPCH from the 3GPP standard." Pet. App. 7a. The Fifth Circuit disagreed, and affirmed the district court's holding that Petitioner failed to raise a genuine issue of material fact supporting its allegation that Respondents conspired to add CPCH to the feature clean-up list. *Id.*

Like the district court judge, the three-judge panel found that the record revealed "disagreement" among the companies as to the features to be included in the clean-up list, not collusion. Pet. App. 8a. Unable to find any evidence in the record supporting Petitioner's claim of a conspiracy, and acknowledging "informal communications [as] an important part of the standard setting process," the Fifth Circuit concluded that the evidence amounted to no more than "an exchange of

information, followed by parallel conduct when the [Respondents] (and over 100 other companies) unanimously voted to remove CPCH." Pet. App. 8a, 10a. "As [Petitioner] ha[d] not met the threshold requirement of demonstrating the existence of an agreement in restraint of trade," the Fifth Circuit affirmed the district court's grant of summary judgment. Pet. App. 11a.

The Fifth Circuit did not address any of the genuinely legal issues before it, for example whether the district court erred in holding that the alleged conspiracy, had it been proven, would be *per se* illegal. Pet. App. 11a & n.2. Judge Garza, writing for the court, said: "As GBT has not met the threshold requirement of demonstrating the existence of an agreement in restraint of trade, we need not review the district court's findings as to the remaining requirements of a § 1 violation." Pet. App. 11a. In other words, the decision below rests entirely on a failure of proof as to the alleged *ultra vires* conspiracy.

REASONS FOR DENYING THE PETITION

The Petition is not worthy of this Court's review because the case does not actually present the legal issue that Petitioner contends warrants review. In reality, the case was decided on the facts and dismissed on account of a failure of proof.

The Fifth Circuit decided only one issue below: whether there was evidence in the record tending to establish a genuine issue of material fact as to the existence of the alleged conspiracy to remove CPCH from the 3GPP standard. Pet. App. 2a. Based upon a considered review of the record, the Fifth Circuit concluded—as had the district court—that there was a

failure of proof as to the existence of a conspiracy. Pet. App. 11a, 18a. There is absolutely nothing remarkable about the Fifth Circuit's application of the well-settled summary judgment standard to the particular facts of this case. Pet. 7-8. Petitioner does not seriously argue otherwise.

The Fifth Circuit had no occasion to consider, much less decide, Petitioner's Question Presented about "deceptive conduct" in standard setting organizations. Cases such as *Broadcom* and *Rambus* are about the antitrust consequences of (a) a single firm (b) allegedly making intentional misrepresentations to a standard setting organization about (c) the firm's patent portfolio or patent licensing practices. But that issue neither was, nor could have been, raised below. Petitioner has always and only complained about conspiracy, not unilateral deceptive conduct of the sort challenged in *Broadcom* and *Rambus*.

Petitioner would have this Court believe that the "deceptive conduct" issue is presented here because "Respondents violated [the] 3GPP [procedural] mandates." Pet. 12. This both mischaracterizes and misrepresents the record. There is no claim in this case that Respondents violated any 3GPP disclosure rule, or deceived anyone about anything. That alone destroys the basis for the Petition, for without such a claim the Fifth Circuit's decision could not possibly conflict with *Broadcom*.

In fact, Petitioner advances a radical and very different theory, unrelated to *Broadcom* or *Rambus*, that whenever participants in standard setting organizations engage in any supposed "unsanctioned" communications—such as email exchanges that have

not been formally pre-approved—a jury should be allowed, or instructed, to infer an unlawful conspiracy.[1] The Fifth Circuit addressed that briefly, rejecting both the premise and the extraordinary conclusions of Petitioner's argument. As to the premise, the Fifth Circuit agreed with Respondents that in 3GPP "informal communications are an important part of the standard setting process" and indeed are encouraged. Pet. App. 10a-11a. In other words, Petitioner's claim that Respondents violated 3GPP procedural "mandates" is false. Given that, the Fifth Circuit declined to infer anything sinister from the mere fact of informal email communications. *Id.* That is a faithful application of this Court's teachings that conduct consistent with lawful competition cannot be used to infer unlawful conspiracy, *see Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984), and thus presents no issue worthy of review. In any event, the only upshot of this decision was that the Fifth Circuit resolved this case by applying the well-established summary judgment standards concerning alleged antitrust conspiracies.

Needless to say, a case that does not actually present Petitioner's Question Presented—because the issue was never raised—would be an exceptionally poor vehicle for addressing that question. The decision below in no way signaled the Fifth Circuit's views with regard to deception as a way to subvert standard setting decisions; nor did it touch in the least on the

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[1] There is no evidence that 3GPP rules prohibit the kinds of email exchanges at issue in this case. Petitioner's argument, rejected by the district court and the Fifth Circuit, is that unless email exchanges are affirmatively authorized by 3GPP, they are unsanctioned and thus illegal.

questions raised in *Broadcom* and *Rambus*. This is a routine case of a record that fails to sustain Petitioner's allegations of a conspiracy. The Petition should be denied.

1. The sole Question Presented in the Petition is "[w]hether deceptive and joint conduct which violates mandates governing the consensus process of a standard setting organization results in antitrust liability where such conduct removes a member's product from the standard." Pet i. This is plainly an effort to relate this case to *Broadcom* and *Rambus*, and in particular to suggest a circuit-split in relation to *Broadcom*. But this case has to do with neither deception nor the monopolization theories in *Broadcom* and *Rambus*. Nothing remotely like that was ever raised below.

During the last twelve years, there have been several antitrust cases and extensive legal commentary about whether it violates antitrust law for a single firm participating in a standards setting organization to lie or deliberately conceal material information about its patent portfolio so that the standards setting organization will unwittingly adopt a standard that reads on the firm's patents. *See, e.g., In re Dell Computer Corp.*, 121 F.T.C. 616, 618 (1996); ABA Section of Antitrust Law, *Antitrust Law Developments* 290-92 (6th ed. 2007). *Broadcom* and *Rambus* are of that ilk. In *Rambus*, the Federal Trade Commission ("FTC") alleged that Rambus Inc. had violated Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 5 of the FTC Act, 15 U.S.C. § 45, by deliberately concealing material information about its patent portfolio from an industry group that established standards for memory chips. *In re Rambus, Inc.*, No. 9302, 2006 WL 2330117

(FTC Aug. 2, 2006), *rev'd sub nom. Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008), *cert. denied*, No. 08-694, --- U.S. ---, 2009 WL 425102 (Feb. 23, 2009). Broadcom Corp. ("Broadcom") brought another such case against Qualcomm alleging that Qualcomm had deliberately deceived a standard setting organization about its intentions to license on so-called fair, reasonable and non-discriminatory ("FRAND") terms any of its patents that were technically necessary to implement a standard. *Broadcom Corp.*, 501 F.3d at 304. In *Broadcom Corp.*, the Third Circuit ruled that Broadcom's complaint stated a claim for monopolization. *Id.* at 315.

This case is entirely different. This is not a monopolization case at all, but rather a conspiracy case that failed for insufficient proof of the alleged *ultra vires* conspiracy. This case has nothing to do with deceptive conduct of the kind at issue in *Rambus* or *Broadcom*, where a single firm allegedly improves the market power in its patents by lying to a standard setting organization in order to convince the organization to adopt its patented technology as the standard. Petitioner never alleged that Respondents lied to 3GPP about anything; it alleged a "smoke-filled room" conspiracy to rig a vote. And far from being a case in which allegedly deceptive conduct is used to get one's patents "in" a standard, this case is about an effort to clean-up a standard by ridding it of technologies that no one wanted to use or was using. It is no wonder then that neither *Rambus*, *Broadcom* nor any other so-called "patent holdup" case was cited by Petitioner or considered by the courts below.

2. The only issue the Fifth Circuit decided was whether there was a triable issue as to conspiracy.

After citing the basic principles of Section 1 of the Sherman Act,[2] the Fifth Circuit summarized this case as follows:

> GBT argues that email communications between the [Respondents] and others following the Scottsdale meeting show a conspiracy, in the form of a group boycott, to eliminate CPCH from the 3GPP standard. The district court disagreed, granting summary judgment because GBT failed to present any evidence supporting the inference of a conspiracy. We agree.

Pet. App. 7a; *see also* Pet. App. 27a. Importantly, the Fifth Circuit expressly declined to address "the remaining requirements of a § 1 violation." Pet. App. 11a & n.2 (refusing to endorse any of the district court's rationale for granting summary judgment in favor of Respondents, other than its conclusion that Petitioner did not present sufficient evidence of a conspiracy to take to a jury). Thus, it did not consider even impliedly any issue other than Petitioner's failure to present a triable issue of material fact on conspiracy. Pet. App. 1a-11a.[3]

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[2] As outlined by the Fifth Circuit, "[t]o establish a § 1 violation, a plaintiff must prove that: (1) the defendants engaged in a conspiracy; (2) that restrained trade; (3) in the relevant market. *Once a plaintiff establishes that a conspiracy occurred*, whether it violates § 1 is determined by the application of either the *per se* rule or the rule of reason." Pet. App. 6a (emphasis added) (citations omitted).

[3] Petitioner agrees with this reading of the lower courts' decisions. It concedes that "[t]he [d]istrict [c]ourt found that

It follows that the only question properly reviewable in this Court—if it met the standards for a writ of certiorari—would be adequacy of the proffered evidence of conspiracy. Petitioner, however, identifies nothing novel or of general importance in either the district court's or the Fifth Circuit's holdings that the documentary evidence in this case does not support a reasonable inference of a conspiracy. The legal principles for assessing evidence of conspiracy in an antitrust case were settled over twenty years ago. *See Monsanto*, 465 U.S. at 768 ("The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [parties]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."); *see generally Antitrust Law Developments* 965-75 (summarizing the substantial body of case law regarding the application of Federal Rule of Civil Procedure 56 standards to claims of concerted action). It is evident that these are the

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Respondents' conduct reflected a standard-setting organization at work and that ... [Petitioner] provided *no evidence* that Respondents had a conscious commitment to a common scheme designed to achieve an unlawful objective." Pet. 6-7 (emphasis added). Petitioner further concedes that, like the district court, "[t]he Fifth Circuit held that *none of the emails, or any other evidence presented*, showed an explicit understanding between the Respondents to collude and unlawfully eliminate CPCH from the standard." Pet. 7 (emphasis added).

standards applied below. *See* Pet. App. 8a (citing *Matsushita*). In fact, Petitioner concedes they were applied. Pet. 19.

Petitioner complains that the lower courts applied *Matsushita* and similar cases "without considering . . . the issue of antitrust harms that can result from the violation of [standards setting organization] rules designed to prevent collusion." *Id.* That is false. That this case arises in the standard setting context is plain, and Petitioner had every opportunity to make—and made—its argument that *ultra vires* forms of collusion could undermine legitimate standard setting activities. In fact, Petitioner convinced the district court to rule, when deciding Respondents' motion to dismiss, that if collusion had undermined the formal standard setting process, it would be *per se* illegal.[4] Pet. App. 27a, 44a. Petitioner's case failed on the facts, because the emails that allegedly prove the *ultra vires* conspiracy in reality prove that no consensus was reached on removing CPCH from the 3G standard until the issue came up during a formal, plenary session of 3GPP.

3. In the end, Petitioner tries to turn its conspiracy case into a *Broadcom*- and *Rambus*-style deception case by equating deception about patents, the particular concern in *Rambus* and *Broadcom*, with any kind of (alleged) standard setting rules violation. Contrary to well-established precedents establishing the minimum evidence necessary to support a claim of conspiracy, Petitioner boldly proclaims that all "conduct which undermines the consensus forming mandates of [a standards setting organization] must

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[4] The Fifth Circuit declined to endorse this view, but did not reject it either. Pet App. 11a n.2.

constitute a violation of the Sherman Act as a matter of law." Pet. 8. Petitioner even argues that any unsanctioned communication among standard setting organization participants should be viewed "as direct evidence of a conspiracy." Pet. 20.

There is no doubt that the Fifth Circuit was unimpressed by Petitioner's suspicious attitude about standard setting and its attempt to manufacture technical violations of formal communication protocols as a substitute for evidence of conspiracy. Judge Garza noted how courts have long-recognized the benefits to society from industry standard setting endeavors, Pet. App. 10a, and with respect to 3GPP he wrote: "The standards 3GPP sets allow the numerous necessary components of cellular communications to operate compatibly"—a plainly procompetitive object. *Id.* He also noted the record evidence that 3GPP *encouraged* informal communications, undermining the very premise of Petitioner's arguments. *Id.*[5]

That said, the only consequence of these observations about policy was to reinforce the application of the general rules of conspiracy established by *Matsushita* and its progeny. Pet. App. 10a-11a ("[W]e decline to infer conspiratorial action on the basis of limited circumstantial evidence, particularly where this evidence is at least as consistent with permissible competition, and with

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[5] The District Court similarly held: "GBT describes [Respondents'] 'orchestration of a plan' with '*illicit exchanges*' to 'escape detection' as evidence of a common scheme against GBT. But again, GBT provides only attorney argument and no evidence to support the allegations of a conspiracy by [Respondents]." Pet. App. 24a-25a (emphasis added) (citations omitted).

independent action, as with unlawful conspiracy."). The legal analysis upon which the case was decided is therefore entirely unremarkable. It simply came down to the evidence as to whether there was a conspiracy, the least substantial grounds there are for this Court to grant review. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("[This Court does] not grant a certiorari to review evidence and discuss specific facts."); *Texas v. Mead*, 465 U.S. 1041, 1042-43 (1984); *see also* S. Ct. R. 10.

Nothing in the Third Circuit's *Broadcom* decision suggests that conspiracy allegations in the context of standard setting deserve a special and less rigorous summary judgment standard. Indeed, *Broadcom*, a monopolization case, says nothing whatsoever about conspiracy, the issue in this case. It neither holds nor implies that any violation of standard setting organization rules "must constitute a violation of the Sherman Act as a matter of law." Pet. 8. *Broadcom* addresses one very specific thing: whether an allegation that a patent holder made an "intentionally false promise to license essential proprietary technology on FRAND terms" states a claim for monopolization. *Broadcom Corp.*, 501 F.3d at 314. The Third Circuit held it did, but not because all rules violations in the context of standard setting are suspect. Its analysis, whether or not this Court would accept it, was narrow and focused on the particular nature of a unilateral FRAND commitment or absence of such commitment, which the Third Circuit thought was "a key indicator of the cost of implementing a potential technology." *See id.* at 313.

Petitioner's attempt to bootstrap 3GPP's communication "mandates" into evidence of conspiracy

is entirely different. Email communications, unlike intentionally deceptive patent disclosures, are a routine part of the way that 3GPP, and for that matter every standard setting organization, does business between meetings. Without emails, the technical work of 3GPP, whose members span the globe, would grind to a halt. Moreover, that an email is "unauthorized" by itself says nothing about whether it evidences an unlawful conspiracy. The vast majority of emails exchanged by standard setting organization participants, authorized or not, are innocuous, and surely do not *require* a finding of unlawful conspiracy. Neither *Broadcom* nor any other case endorses this view. Indeed, they do not come within light years of addressing this issue.

4. To the extent Petitioner is truly advancing a *Broadcom*-style deception argument, it was never raised below and is therefore waived. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *United States v. Ortiz*, 422 U.S. 891, 898 (1975). Until Petitioner requested certiorari, this case had been about allegations that Respondents were subject to antitrust liability because they had engaged in a continually morphing *ultra vires* conspiracy, not deception. It is much too late for Petitioner to reinvent its case once again. This Court does not sit to consider an issue when the lower court has not so much as been asked to consider it. To the contrary, this Court's "traditional rule" precludes a grant of certiorari "when the question presented was not pressed or passed upon below," *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation

marks omitted), precisely because the Court "sits as a court of review," and not as a court of first impression, *Duignan v. United States*, 274 U.S. 195, 200 (1927).

CONCLUSION

The petition for writ of certiorari should be denied.

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In The
Supreme Court of the United States

GOLDEN BRIDGE TECHNOLOGIES INC.,
Petitioner,

v.

MOTOROLA INC; ERICSSON INC; QUALCOMM INCORPORATED; LUCENT TECHNOLOGIES INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-11a) is published at 547 F.3d 266. The First memorandum opinion and order of the United States District Court for the Eastern District of Texas (Pet. App. 32a-50a) is published at 416 F.Supp.2d 525. The Second memorandum opinion and order of the United States District Court for the Eastern District of Texas (Pet. App. 12a-31a) is unpublished. It is unofficially reported at 2007 WL 2688487.

JURISDICTION

This judgment of the Court of Appeals was entered on October 23, 2008. The Petition for Writ of Certiorari was filed on January 21, 2009, and placed on the docket on February 23, 2009. The Brief of the Respondents in Opposition was filed on March 25, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION [INVOVLED]

The Sherman Act, 15 U.S.C. § 1, provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

PETITIONER'S REPLY TO BRIEF OF THE RESPONDENTS' IN OPPOSITION

I. Petitioner's Legal Question is Properly Before this Court

Respondents are incorrect in asserting that this case does not present the legal issue identified in Petitioner's Question Presented. To support their argument, Respondents mischaracterize the nature of Petitioner's pleadings to the lower courts in this matter and contend that Petitioner did not present any argument based upon or related to deceptive conduct in the standard setting organization context. Respondents' contention in this regard is not supported by the record and in fact, is directly contradicted by two of Petitioner's primary briefings to the lower courts in this case, including (1) Petitioner's Cross Motion for Summary Judgment before the District Court, and (2) Petitioner's Reply Brief to the Fifth Circuit Court of Appeals.

Petitioner, Golden Bridge Technology ("GBT"), consistently argued in lower both lower courts that Respondents' deceptive conduct, which violated 3GPP mandates, requires the imposition of antitrust liability under 15 U.S.C. § 1. Petitioner has actively pursued this theory of the case since the outset of this matter. In support of its theories, Petitioner presented ample factual and legal authority to the lower courts as a means to prove the existence of Respondents' conspiracy to exclude GBT's technology from the wireless communications market. Respondents' argument to the contrary ignores the record GBT has established in the District Court and to the Fifth Circuit Court of Appeals.

The main thrust of Petitioner's legal argument has always been that Respondents engaged in an improper and unsanctioned series of email communications in violation of the Third Generation Partnership Project ("3GPP") mandates. Moreover, Petitioner has specifically cited and relied upon persuasive legal authority which requires the imposition of antitrust liability when deceptive conduct occurs within the confines of a standard setting organization including citations to and arguments based on *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, n. 5 (3rd Cir. 2007). Accordingly, the legal question presented by Petitioner's is properly before this Court.

II. Petitioner's Cross Motion for Summary Judgment before the District Court Identified the Issues in Petitioner's Question Presented here

While this matter was pending before the District Court, Petitioner filed a Cross Motion for Summary Judgment which specifically presented two issues for the Court's consideration as follows:

A. Whether the Defendants' communications, made in secret to implement a plan to exclude CPCH technology, were not authorized by the 3GPP organization because they failed to meet the 3GPP requirements for either an ad hoc or off-line session.

B. Whether this Court should find that Defendants' communication fall outside of any standards setting process as a matter of law because they were not requested,

> established or authorized by the 3GPP organization.

See, Pet. App. 61a.

These issues were presented, briefed, and argued in an attempt to obtain a ruling from the District Court that Respondents' conduct: (1) was not authorized by 3GPP, and (2) fell outside the confines of any standard setting process. Petitioner sought this ruling in order to support its ultimate position that Respondents engaged in an unlawful conspiracy outside the confines of any legitimate 3GPP activities and therefore, did not serve the pro-competitive benefits inherent in the standard setting process. Petitioner supported its legal theory by arguing that Respondents' secret email exchange had not been sanctioned by 3GPP, and in fact had violated fundamental rules established by 3GPP to govern the consensus process.

Despite the consistency in Petitioner's legal position before the District Court, Respondents Opposition Brief brazenly argued that: "There is no claim in this case that Respondents violated any 3GPP disclosure rule, or deceived anyone about anything." Respondents' Brief at p. 10. This contention is directly contradicted by the record. Moreover, Respondents intentionally ignore the underlying premise of Petitioner's legal action, to wit: Respondents engaged in an unlawful conspiracy, outside the confines of 3GPP, to remove CPCH from the market.

III. Petitioner's Reply Brief to the Fifth Circuit Court of Appeals Continues the Assertion of the Legal Arguments Before this Court

On appeal, Petitioner's legal theory remained consistent. In its reply brief to the Fifth Circuit, Petitioner argued that:

> Appellees' conduct, before, during and after the Tokyo meeting did not comply with established policies and procedures, resulting in anticompetitive activity under the applicable per se rule.

See, Pet. Reply App. 12a. Moreover, the first heading of Petitioner's Argument and Authority section read:

Appellees' Email Exchange Was Unauthorized and Resulted in Anti-Competitive Conduct

See, Pet. Reply App. 14a. In this way, Petitioner's brief unequivocally expressed GBT's contention that Respondents' unauthorized email exchange constituted anti-competitive conduct. As authority for this position, Petitioner specifically cited to the section in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, n. 5 (3rd Cir. 2007) where the Third Circuit Court stated:

> Thus, ***antitrust law has historically been concerned with the risk of one or a small number of participants capturing the economic power of an industry-wide standard and turning the SSO into a source of exclusionary power***. Simply put, by hijacking or capturing an SSO, ***a single***

> ***industry player can magnify its power and effectuate anticompetitive effects on the market.***

See, Pet. Reply App. 14a. Relying upon this authority, Petitioner's briefing emphasized the danger posed when a single competitor abuses the standard setting process. Petitioner's briefing also underscored the importance of abiding by SSO policies and procedures, to wit: "...following SSO policies and procedures is critical to prevent abuse and protect the pro-competitive goals of the standard setting organization." See, Pet. Reply App. 15a.

Despite the clarity of Petitioner's briefing as cited above, Respondents' Opposition posits inaccurate contentions which boldly misstate Petitioner's legal position in this matter. For instance, Respondents' Opposition Brief argues: "It is no wonder then that neither Rambus, Broadcom nor any other so-called 'patent holdup' case was cited by Petitioner or considered by the courts below."[1] See, Respondents' Brief at p.13. Respondents' brief goes on to argue that: "To the extent Petitioner is truly advancing a Broadcom-style deception argument, it was never raised below and is therefore waived." See, Respondents' Brief at p. 19. However, it is apparent from a review of the record that Petitioner has consistently asserted the current legal question before this Court. Respondents' suggestion that such issues

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[1] Respondents fail to acknowledge that the *Rambus* decision was not decided by the District of Columbia Circuit Court of Appeals until April 22, 2008. As a result, Petitioner could not have cited or relied upon the *Rambus* decision because it was not in existence at the time briefing was submitted to the Fifth Circuit Court of Appeals.

"were never raised" is a thinly veiled attempt to distract the Court from the important legal issues presented by this case.

Furthermore, Petitioner's briefing did cite to the *Broadcom* decision, and relied upon the Third Circuit's holding as a means to support Petitioner's legal theory that Respondents' engaged in deceptive conduct which disregarded the rules governing 3GPP's consensus process. As a result, Respondents' actions imperiled the pro-competitive benefits which allow 3GPP to operate outside the strictures of the Sherman Act. Once Respondents, acting jointly, stepped outside the confines of 3GPP's legitimate standard setting framework, they exposed themselves to potential antitrust liability for deceptive conduct in derogation of 15 U.S.C. § 1. Petitioner's contentions in this regard have never wavered.

CONCLUSION

Petitioner has consistently maintained that deceptive conduct which subverts the pro-competitive goals of standard setting organizations violates the Sherman Act. GBT's legal arguments on this important issue were briefed to both the District Court and to the Fifth Circuit Court of Appeals. In light of Petitioner's well-briefed position regarding SSO subversion it is clear that the issue is properly before this Court for consideration.

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